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91-328

No. _____

Supreme Court, U.S.
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IN THE UNITED STATES SUPREME COURT

October Term, 1991

Keith Farrell, William Murray, Richard Richardson

Petitioners

v.

Automobile Club Of Michigan

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIX CIRCUIT

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QUESTIONS PRESENTED

I

DOES THE DECISION OF THE APPELLATE COURT ALLOW A ERISA FIDUCIARY TO BENEFIT FROM ITS FRAUD ON OR MISREPRESENTATIONS TO PLAN PARTICIPANTS IN DEROGATION OF THE STATUTE'S INTENT?

II.

DID THE APPELLATE COURT ERR IN HOLDING THAT DEFENDANT'S BREACHES OF FIDUCIARY DUTIES: (A) WHICH DEPRIVED PETITIONERS OF THE ABILITY TO MAKE INFORMED DECISIONS, DAMAGE THEM BY INDUCING ACCEPTANCE OF LOWER BENEFITS; AND (B) ADVERSELY AFFECTED THE LUMP SUM BENEFIT RECEIVED FROM DEFENDANT'S SPECIAL EARLY RETIREMENT OFFER, WERE NOT RECOVERABLE THROUGH AN ACTION FOR LOST BENEFITS UNDER ERISA?

III.

DID THE DECISION OF THE APPELLATE COURT ANNUL 29 USC SECTION 1132(a)(B) WHEN BENEFICIARIES TRY TO RECOVER BENEFITS LOST BY THEM DUE TO THE FIDUCIARY'S MISREPRESENTATIONS?

IV.

DID THE DECISION OF THE APPELLATE COURT

EFFECTIVELY REWARD AN ADMINISTRATOR'S FAILURE TO REPORT REQUIRED INFORMATION TO PARTICIPANTS, ENCOURAGE DISREGARD OF STATUTORY PROVISIONS INTENDED TO INFORM PARTICIPANTS OF CHANGES IN THEIR PLAN; IT ENCOURAGES ADMINISTRATOR ACTS THAT UNDERMINE THE INTENT OF THE STATUTE?

V.

IS THE DECISION OF THE LOWER COURT ERRONEOUS IN FAILING TO EXERCISE PENDANT JURISDICTION OVER THE PETITIONERS' STATE AGE DISCRIMINATION CLAIMS?

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OPINIONS BELOW

Petitioners herein, pray that a Writ of Certiorari issue to review the portion of the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on March 28, 1989 to the extent it affirmed the Judgment For Defendant (R 65) entered by the United States District Court and the Judgment of the Court of Appeals of March 1, 1991, (Appendix A, infra., at p. 69) affirming the Judgment of the United States District Court entered December 12, 1989. (R 107)

The opinion of March 28, 1989, the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case (R 89) is reported at **Farrell v Automobile Club of Michigan**, 870 F2d 1129, 1133-34 (6th Cir., 1989) and is printed in Appendix A, infra., hereto, at page 7. The Judgment of the United States District Court for the Eastern District of Michigan, Southern Division is printed in Appendix A, infra., at page 6; its Memorandum

Opinion and Order is at App. A, infra., page 1.

The opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on March 1, 1991 is unreported and is printed in Appendix A, infra., at page 68. The Judgment of the United States District Court for the Eastern District of Michigan, Southern Division is printed in Appendix A, infra., at page 66. Transcripts of the District Court's Bench Opinions to which said Judgment makes reference are found at Appendix A, infra., pp. 13-34 and 35-63.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit (Appendix A, infra., at page 68) was entered in the above-entitled case on March 1, 1991. A timely Motion To Stay The Issuance Of The Mandate was issued on March 1, 1991. The jurisdiction of the Supreme Court is invoked under 28 USC Section 1254(1).

STATUTE INVOLVED

The statute involved in this matter is the Employee Retirement Income Security Act Of 1974,

as amended (ERISA), 29 USC 1001, et seq.; P. L. 93-93-406; 88 Stat. 829, more particularly 29 USC Sections 1001, 1021(b), 1022(a) and (b), 1023(a), (b) and (d), 1024, 1102(b)(4), 1103(C), 1104(A), 1109, and 1132, AS more specifically set out in Appendix B.

STATEMENT OF THE CASE

I.

THE OVERVIEW

Petitioners were Defendant's long-term management employees who in 1980, were over age 55. Defendant provides emergency road service and is Michigan's largest provider of automobile insurance coverage. It maintains branch offices. Two Petitioners were branch office managers. Petitioner Richardson was primarily associated with Defendant's claims operation. Defendant structured its branch offices as Class I, II and III. Class I branch managers were classified higher and received higher pay than Class II managers, IIs higher than IIIs.

In 1980, Defendant began 3 intertwined personnel activities: (1) it employed a

consultant, Cole & Associates (Cole) to study the structure of its branch offices; (2) Soon thereafter, it hired another consultant initiating what it termed the "Hansen Study;" (3) Almost simultaneously, Defendant communicated with a third consultant concerning an offer of what it called a "One-time only" Special Early Retirement Offer ("SERO") for over age 55 employees, among whom were these Petitioners.

In 1980, Cole, a subsidiary of Defendant's actuary, Wyatt Company, (Wyatt) submitted a study, BRANCH MANAGER STUDY PHASE I FINAL REPORT. Part I evaluated and established salary ranges for levels of Branch Manager positions. Part II developed a new management salary structure and "fit" all managerial positions into the structure. (R 60: **PLAINTIFFS' BRIEF IN RESPONSE—TO DEFENDANT'S MOTION FOR PARTIAL DISMISSAL**, Ex. 1 at p. 6)

Cole concluded that Defendant was paying more to its branch managers than certain of its selected competitors. Cole wrote, "This fairly high compa ratio appears to be the result of a

number of managers having long service tenure." (R 60: PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANT'S MOTION FOR PARTIAL DISMISSAL, Ex. 1 at page 6) Discovery revealed that managers were overwhelmingly over 55. (R 60: PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANT'S MOTION FOR PARTIAL DISMISSAL, Ex. 1, p. 6)

Cole also found that, "as positions move up in the. . . structure there is a tendency for managers to stay in a given position for a longer duration, thus a spread greater than 50% will accommodate the seasoned employees' salary increase growth." (R 60: PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANT'S MOTION FOR PARTIAL DISMISSAL, Ex. 1, p. 6) The vast majority of "seasoned" employees were over 55.

Hansen submitted its study to Defendant in April, 1980. Hansen proposed to assist Defendant develop new salary programs for salaried employees. It noted that Defendant recently had restructured its entire organization. (R 60: PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANT'S MOTION FOR PARTIAL DISMISSAL, Ex. 3)

Implementation was targeted for August, 1980.

In February, Defendant also communicated with its actuary and by April, 1980, showed interest in an offer of what it called a one-time Special Early Retirement Offer (SERO) for employees over 55. (R 60: **PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANT'S MOTION FOR PARTIAL DISMISSAL**, Exs. 4 & 5)

Defendant, Petitioners' employer, also served as fiduciary of an ERISA plan in which Petitioners participated. Values of the plan were computed based on certain actuarial assumptions, among which were a life expectancy factor and a discount factor for the Plan's current benefit value. Wyatt did not recommend changing these factors, but offered the Defendant options. (R 50: **PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANT'S MOTION FOR PARTIAL DISMISSAL**, Ex. 13. Also see: R 60: **PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANT'S MOTION FOR PARTIAL DISMISSAL**, Ex.4)

Defendant's original pension plan offered full monthly cash benefits at a retirement age set by the Plan, reduced early retirement

benefits and a lump sum benefit election. Since inception, the plan had a 6% interest rate assumption which Defendant used to discount benefit values to ascertain equivalent values if an employee elected the lump sum benefit. Actuaries refer to this interest discount factor as UP-1984-6%.

When Defendant implemented the SERO, it used a 10% interest rate assumption which Defendant used to discount benefit values in order to ascertain equivalent values if an employee elected the lump sum benefit. A higher discount rate means less money is available to a participant taking a lump sum and the lower funding Defendant-employer had to contribute. Defendant failed to amend the Plan to change the discount rate until well after the events that led to this litigation and after the Richardson Petitioner filed a Civil Rights charge. That amendment lowered the discount interest rate, affording future retirees a higher lump sum benefit at Petitioners' expense and allowed Defendant to contribute less to fund the Plan.

Defendant had statutory and common law fiduciary duties. Wyatt wrote Defendant that using a 6% interest factor was "consistent with present practices" but may be "too generous" to participants Defendant wished to induce into early retirement. (R 50: **PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANT'S MOTION FOR PARTIAL DISMISSAL**, Ex. 13, p. 2. Also see: R 60: **PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANT'S MOTION FOR PARTIAL DISMISSAL**, Ex.4, p. 2) Wyatt also noted that the use of the 6% factor "will dramatically increase the cash an individual may receive. . . .[T]his may or may not be considered desirable." Its literature showed savings to Defendant by the using the 10% factor. (Ibid.)

Petitioners' actuary noted Defendant cost Plan participants induced into early retirement more than $1.7 million by changing the discount rate. Defendant failed to disclose the changed discount rate to Petitioners thereby depriving them of the means by which they could make an informed election, thereby violating ERISA.

Petitioner Richardson expressly asked

Defendant for information of his lump sum benefit under the Plan if he continued working to age 62 and annually received his salary raises averaged over his long career. He asked for similar information if he chose to work to age 65. Defendant deliberately gave him false information. (R 50: PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANT'S MOTION FOR PARTIAL DISMISSAL, Compare: Exs. 5 to Ex. 4) Petitioner Murray was denied important information he requested. (R 52, Deposition of William Murray,Tr. at p.47) Defendant's acts and omissions deprived Petitioners of the means by which they could make a meaningful, informed election of SERO.

I.R.S. Revenue Ruling 79-90 concerns fairness of disclosure and prohibits changing actuarial assumptions the way Defendant changed them. While not fully in effect until after these events, this fiduciary-Defendant knew or should have known of its existence, its intent and its spirit. This Court has imposed common law fiduciary duties as well as fiduciary duties contained in ERISA upon Plan fiduciaries.

Petitioners' actuary testified that the Defendant's change in actuarial assumptions was arbitrary and capricious conduct. R 55: Continuing Deposition of Craig Arnold, Tr. pp. 57-66, 77-79) The "one-time" only offer of this SERO has now occurred thrice.

Defendant misrepresented that "This special early retirement option provides: 1. Payment of your earned benefit without reduction."[emphasis added] (R 50: **PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANT'S MOTION FOR PARTIAL DISMISSAL**, Ex. 3)

Each Petitioner accepted the offer. The Richardson Petitioner testified that: (A) he was approached to take the offer; (B) he asked Defendant to explain the Plan to give him estimates of his lump sum benefit if he continued working for Defendant until ages 62 and 65 respectively and, then, for a similar estimate in which Defendant assumed a continuation of his average salary raises until he reached, first, age 62, and then, assuming the same facts until he reached age 65; (C) Defendant gave him false and misleading information on the questions he

asked concerning those estimates; (R 50: **PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANT'S MOTION FOR PARTIAL DISMISSAL**, Compare: Exs. 5 to Ex. 4) (D) he attended a meeting and was told he had minutes to accept the SERO; (E) he was told by his superiors that **"You will retire;"** (F) Defendant let him understand that his career would be dead-ended if he did not accept SERO, and similar testimony. (R 53: **Deposition of Richard Richardson**, at Tr. pp. 23-25; 27-39)

A comparison of two documents gained through discovery, shows that Defendant knowingly computed Petitioner Richardson's benefits at ages 62 and 65 **without** showing the assumptions Richardson requested, then misrepresented the information communicated to him as being "in accordance with your request." (R 50: **PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANT'S MOTION FOR PARTIAL DISMISSAL**, Compare: Exs. 5 to Ex. 4) Defendant could have provided the estimates requested as discovery revealed that Defendant's own records of the Plan contained estimates for the final 60 months of average earnings. (R 50:

PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANT'S MOTION FOR PARTIAL DISMISSAL, Exs. 7, 8 & 9)

Petitioner Murray testified that: (A) He was constructively demoted to a smaller office, (B) he called Defendant to ask about the SERO, but his calls were not returned; (C) he was summarily removed from Defendant's employment committee; and (D) he was otherwise made to feel his career was dead-ended if he did not accept the offer. He reluctantly accepted SERO. (R 52: **Deposition of William Murray**, Tr. at pp. 23-25; 27-39) Farrell testified he saw a dead-ended career in a small office to which he had been "demoted" and felt forced to take the offer. (R 54: **Deposition of Keith Farrell**, Tr. at pp 53-55)

One expert's opinion is that Defendant created confusion among its employees by having 3 major events occurring so close in time; and that Defendant: (A) badly structured its methods of communicating its offer to its employees; (B) failed to adequately explain individual circumstances to Petitioners; (C) failed to have adequate counseling; (D) if asked, should project

estimated future benefits based on past history coupled with appropriate disclaimers; (E) should have made certain that its representation to Petitioners that the offer was a "one-time" offer was true, as such a representation added unnecessary extra pressure on Petitioners to accept what on the surface looked like a lot of money; (F) should have fully and adequately disclosed all elements affecting benefits; its conduct deprived Petitioners of the means by which they could make informed choices. (R 50: **PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANT'S MOTION FOR PARTIAL DISMISSAL**, Ex. 15 & 16)

Petitioners' actuary expert testified similarly, adding his opinions concerning the Defendants' Plan changes and discount rate. The Richardson Petitioner developed a chart showing that Defendant massively replaced its over age 55 employees with younger people. (Ibid.)

Petitioners received substantial retirement benefits: (A) Richardson's lump sum exceeded $180,000 but Defendant admitted he would have known he could have received over $200,000 had

his inquiry concerning future projections been properly answered; (2) Murray received over $191,000 but Defendant said, he would have known he could have $202,000-$230,000 had his inquiries been answered; (C) Farrell received over $151,000. With full information, he would know that Defendant calculated he could have received $160,000 to over $167,000 by working but two extra years. (R 22: **ANSWERS TO PLAINTIFFS' INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS**, Interrogatory. 5 & 6)

Petitioners could not know Defendant switched actuarial assumptions that affected the lump sum amounts it had calculated for each. Defendant did not disclose this change when it established the rules of the game.

A summary of Petitioners' actuary's opinions concerning the ERISA issues is that Defendant's conduct was arbitrary and capricious. (R 51: **Deposition of Craig Arnold**, June 26, 1987, Tr. at pp 30--51, 53-65, 69, 72, 80, 82, 86-88. Also see: R 55: **Continuing Deposition of Craig Arnold**, Tr. pp. 20-37, 40-42, 48-66, 69-79, 81-

86, 92-108. He also testified that Defendant's change of at least 2 of the basic actuarial assumptions was an arbitrary and capricious act and was done without plan authority, authorization by its Board or any act that could remotely be thought to be authorization until a time subsequent to Mr. Richardson's filing a charge with the Michigan Department of Civil Rights some 2 years later. (Ibid.)

Petitioners developed the factual scenario presented here. Their acceptance of SERO lacked "reality of consent" as Defendant misrepresented material and substantial facts. Defendant's acts breached of ERISA provisions, including fiduciary duties created by statute and common law. While Defendant's acts and omissions breached its ERISA fiduciary duties, the same misconduct by Defendant, depriving Petitioners of material information on the one hand, and deliberately falsifying information on the other, constituted fraud, misrepresentation, or, since the acts and omissions were those of a fiduciary, undue influence, thereby voiding any consent

Petitioners may have given accepting SERO. Defendant's misconduct cost Petitioners benefits. They brought this action to recover benefits.

II.

LITIGATION HISTORY

In August, 1983, Petitioners filed a Complaint in the State Court. They alleged state breach of contract and related claims as well as violations of the Michigan Elliott-Larsen Civil Rights Act, MCL 37.2101, et seq.; MSA 3.548(101), et seq. (R 50: Ex. COMPLAINT AND JURY DEMAND, filed in the State Circuit Court) The State suit proceeded until October 24, 1985, when Defendant filed a Dispositive Motion, the gist of which was that all of Petitioners' claims were pre-empted by ERISA, 29 USC 1001, et seq.

Though Defendant's Motion was not ruled on by the Circuit Court, Petitioners filed their Federal COMPLAINT commencing this action on August 22, 1986. (R 1: COMPLAINT) The primary thrust of each of Petitioners' COMPLAINT was their claim for pension benefits owed them. The State Court ruled on January 21, 1987. (R 50,

PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANT'S MOTION FOR PARTIAL DISMISSAL, Ex. 17) and dismissed most of the Complaint except for allegations that did not concern a pension plan.[1] By that time, this law suit was well under way.

On September 8, 1987, Defendant brought a Motion in which it sought partial dismissal of Petitioners' claims, challenging its timeliness. (R 45: DEFENDANT'S MOTION FOR PARTIAL DISMISSAL) Defendant supplemented its Motion on September 18, 1987. (R 48: DEFENDANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL DISMISSAL AND PARTIAL SUMMARY JUDGMENT). Petitioners responded on October 5, 1987. (R 50: PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANT'S MOTION FOR PARTIAL DISMISSAL AND FOR PARTIAL SUMMARY JUDGMENT) On November 12, 1987, Defendant filed its BRIEF IN SUPPORT MOTION FOR DISMISSAL AND SUMMARY JUDGMENT. (R 57) Petitioners responded on November 19, 1987. (R 60: PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANT'S

1.The State action was later dismissed in its entirety.

MOTION FOR PARTIAL DISMISSAL) Defendant replied to Petitioners' Response on November 25, 1987. (R 61: DEFENDANT'S REPLY TO PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANT'S MOTION FOR DISMISSAL AND SUMMARY JUDGMENT) Defendant filed a Supplemental Brief on December 4, 1987. (R 63: DEFENDANT'S SUPPLEMENTAL BRIEF) On December 18, 1987, the District Court issued its MEMORANDUM OPINION AND ORDER GRANTING SUMMARY JUDGMENT (R 64) and its JUDGMENT FOR DEFENDANT (R 65) from which Petitioners appealed to the United States Court of Appeals for the Sixth Circuit.

The District Court's MEMORANDUM OPINION AND ORDER GRANTING SUMMARY JUDGMENT held that: (A) Petitioners' action was filed beyond the limitations period; (B) the State Court clearly lacked jurisdiction of Petitioner's claims so the Limitations period was not tolled; and (C) the District Court would not entertain the State claims. (R 64: MEMORANDUM OPINION AND ORDER GRANTING SUMMARY JUDGMENT at pp. 4-6)

On March 28, 1989, the United States Court of Appeals for the Sixth Circuit affirmed the

District Court's refusal to assert pendent jurisdiction over Petitioners' State age discrimination claims and reversed the District Court's holding that Petitioner's ERISA claims were time barred. The case was remanded for further proceedings. (R 89: SLIP Opinion of the United States Court of Appeals); Farrell v Automobile Club of Michigan, 870 F2d 1129, 1133-34 (6th Cir., 1989)

On June 13, 1989, Defendant filed a Motion for Summary Judgment in the District Court (R 93: REVISED MOTION FOR SUMMARY JUDGMENT) This Motion was responded to by Petitioners. (R 95: PLAINTIFFS' RESPONSE TO DEFENDANTS' REVISED MOTION FOR SUMMARY JUDGMENT) Defendant replied to Petitioners' Response. (R 96: DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANT'S REVISED MOTION FOR SUMMARY JUDGMENT) A hearing on the Motion was held on July 13, 1989. The District Court issued its ORDER, in which it denied in part and granted in part the Defendant's Motion. (R 98: ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR

SUMMARY JUDGMENT)

On September 1, 1989, Defendant filed another dispositive motion in which it addressed concerns raised by the District Court on July 13, 1989. (R 99: **DEFENDANT'S RENEWED MOTION FOR SUMMARY DISPOSITION** Petitioners responded on October 10, 1989. (R 103: **PLAINTIFFS' RESPONSE TO DEFENDANT'S RENEWED MOTION FOR SUMMARY JUDGMENT**) On November 30, 1989, a hearing was held. On December 12, 1989, the District Court issued its **ORDER**. (R 106: **ORDER GRANTING DEFENDANT'S RENEWED MOTION FOR SUMMARY JUDGMENT**), entering its **JUDGMENT** for Defendant. (R 107) On January 4, 1990, Petitioners filed a Claim of Appeal with the United States Court of Appeals for the Sixth Circuit. (R 108: **CLAIM OF APPEAL**) On March 1, 1991, the United States Court of Appeals for the Sixth Circuit affirmed the District Court's decision and adopted its rational as explained in its **ORDERS** of July 13, 1989 and December 12, 1989. **(Appendix A, infra., p. 68)**

It is from these decisions and the decision of the Court of Appeals by which it upheld the

District Court's decision to dismiss the Petitioner's pendent claims that the Petitioners seek the issuance of the Writ of Certiorari.

REASONS FOR GRANTING WRIT

Certiorari Should Be Granted because the United States Court of Appeals for the Sixth Circuit decided an important question of federal law in a manner that would have the following results:

A. Its decision would allow a fiduciary of an ERISA plan to benefit from its fraud on or misrepresentations to plan participants;

B. Its decision would nullify the provisions of 29 USC Section 1132(1)(B) when a beneficiary seeks to recover benefits lost due to the fiduciary's misrepresentations;

C. It rewards a Plan Administrator for failing to report required information to the plan participants, encourages disregard of statutory provisions intended to fully inform the plan participants of changes in their plan, and encourages plan administrator's acts that undermine the intent of the statute;

D. Its decision is clearly erroneous in failing to exercise pendent jurisdiction over the Petitioners' state claims.

Except for D., these issues, have not been decided by this Court, but these issues should be decided by this Court. Issue D was decided directly contrary to the holdings of this Court.

A.

1.

THE DECISION OF THE APPELLATE COURT ALLOWS A FIDUCIARY OF AN ERISA PLAN TO BENEFIT FROM ITS FRAUD OR MISREPRESENTATIONS

In enacting ERISA Congress made findings and a declared its policy. 29 USC 1001. Among those findings was one that "the continued well-being and security of millions of employees and their dependents are directly affected by" employee benefit plans and "that owing to the lack of employee information and adequate safeguards concerning" employee benefit plan "operation, it is desirable in the interests of employees and their beneficiaries . . . that disclosure be made and safeguards be provided

with respect to the establishment, operation, and administration of such plans." 29 USC 1001(a)

The statute further states "It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans,and by providing for appropriate remedies."

It is established that remedial legislation should be strictly construed in favor of the class that the legislation is intended to protect. See: **Wirtz v Ti Ti Peat Humus Co.**, 373 F2d 209, cert den. 389 US 834, 88 S Ct 34, 19 L Ed 2d 94 (1967); **Donovan v Kaszycki & Sons** Contractors, Inc., 599 F Supp 860 (S.D.N.Y., 1984); **Edwards v Riverside Products Co.**, 85 F Supp 290 (DC W Va., 1949).

Congressional policy in enacting a statute

should not be defeated. **Atkinson v Sinclair Refining Co.**, 370 US 238, 249, 82 S Ct 1318, 8 L ed 2d 462, 470-471 (1962); **NLRB v Plasterers' Local Union**, 404 US 116, 130, 92 S Ct 360, 30 L Ed2d 312, 323 (1971).

ERISA provisions should be interpreted, if possible, to carry out the Congressional purpose of protecting the interests of plan participants and beneficiaries. **A-T-O Inc. v Pension Ben. Guaranty Corp.**, 634 F2d 1013 (6th Cir., 1980) ERISA should be given a broad construction to carry out its purposes of protecting the interests of plan participants and beneficiaries. **Marshall v Kelly**, 465 F Supp 341 (WD Okla., 1978); **IUE AFL-CIO Pension Fund v Barker & Williamson Inc.**, 788 F2d 118 (3rd Cir., 1986).

In affirming the decision of the District Court, the Court Of Appeals would allow an ERISA fiduciary to benefit from its fraud on or misrepresentations to plan participants. This interpretation of the statute vitiates Congressional of statutory intent.

2.

THE LOWER COURT ERRED IN HOLDING THAT DEFENDANT'S BREACHES OF FIDUCIARY DUTIES: (A) WHICH DEPRIVED PETITIONERS OF THE ABILITY TO MAKE INFORMED DECISIONS, DID NOT DAMAGE THEM BY INDUCING ACCEPTANCE OF LOWER BENEFITS; AND (B) ADVERSELY AFFECTED THE LUMP SUM BENEFIT RECEIVED FROM DEFENDANT'S SPECIAL EARLY RETIREMENT OFFER, WERE NOT RECOVERABLE THROUGH AN ACTION FOR LOST BENEFITS UNDER ERISA

Court of Appeals erred in holding that Defendant's breaches of its ERISA fiduciary duties which deprived Petitioners of their ability to make rational, informed decisions and damaged them by inducing their acceptance of lower benefit amounts was not recoverable by Petitioners through an action for lost benefits under the Employee Retirement Income Security Act (ERISA), 29 USC 1132(a)(1)(B)

These breaches of fiduciary duty adversely affected the lump sum benefit amount Petitioners received as Defendant surreptitiously reduced their benefit by manipulating actuarial interest rate reduction factors. The District Court held:

". . . . . [T]he claims in the defendants' summary judgment motion ignore the claims which plaintiffs have made that defendant breached its fiduciary duty by giving false and/or misleading information, refusing to give information, failing to properly disclose or inform as to plaintiffs' claims.

In the Sixth Circuit opinion in this case . . . the Court ruled that the instant suit cannot be deemed to be exclusively a federal claim arising under 29 USC 1109 outlining liability for breach of fiduciary duty. But, rather, the Sixth Circuit concluded in their opinion that the claim should be read as a claim under 29 USC 132(a)(1)(B) sic. for accrued benefits . . . .

"Therefore, it seems to this Court that plaintiffs cannot now reassert a claim for breach of fiduciary duty and such claim will not preclude summary judgment. The only issue here is the sufficiency of the benefits paid to the plaintiffs under the terms of the Plan." [T. of Proceedings of July 13, 1989, p. 5]

However, in addressing the same issues, the United States Court of Appeals For The Sixth Circuit previously held:

"Plaintiffs' claim can be construed as arising under at least two different ERISA provisions, although as we shall see Section 1132(a)(1)(B) seems the most appropriate. The language at paragraph 17 of plaintiffs' complaint, claiming serious breaches of defendant's fiduciary duty' could be construed . . . under 29 USC Section 1109, outline liability for breach of fiduciary duty. But there is a serious flaw in this reasoning. Section 1109 authorizes relief only to the plan itself, not to individual

beneficiaries. See Massachusetts Mutual Life Insurance Co. v Russell, 473 U.S. 134, 140, 105 S Ct 3085. 3089, 87 L Ed2d 96 (1985) (Section 1109 does not provide a cause of action for extra-contractual damages to a beneficiary caused by improper or untimely processing of benefit claims because Section 1109 relief inures only to the benefit of the plan itself, not an individual beneficiary) Plaintiffs' request for relief, however, is for themselves as individual beneficiaries, not for the plan as a whole.

Alternatively, plaintiffs' complaint could be construed as action 1132(a)(1)(B) action to recover accrued benefits. . . . This construction is supported by plaintiffs' prayer for individual relief in its state complaint and by plaintiffs' federal complaint which expressly requests Section 1132(a)(1)(B) relief." Farrell v Automobile Club of Michigan, 870 F2d 1129, 1133-34 (6th Cir., 1989)

(1) The Fiduciary Standard

Petitioners showed several breaches of the Defendant's fiduciary duty established by statute and judicial interpretation. Petitioners offered expert testimony. Petitioners have shown, by substantial evidence, that Defendant gave them false or misleading information, refused them information they requested, failed to properly disclose or inform, failed to timely file required filings with the government, used direct and indirect pressure to force acceptance, used a discount factor not approved in the plan until 2

years after the fact and other misconduct.

ERISA is a comprehensive remedial statute regulating qualifying pension and benefit plans. Defendant is the Plan's fiduciary and Petitioners' employer. ERISA provides mechanisms to assure that the fiduciary behaves properly and that the participant-beneficiaries receive their correct benefits.

29 USC 1103(c) prohibits the assets of the plan inuring "to the benefit of any employer" ERISA establishes a prudent man standard of care who must comply with 1104(a) and:

> "In general, trustees' responsibilities and powers under ERISA reflect Congress' policy of `assuring the equitable character' of the plans. Thus, rather than explicitly enumerating all of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility.
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> * * * * * * *
>
> The provisions of ERISA make clear that a benefit plan trustee is similarly subject to these responsibilities, not only as a result of the general fiduciary standards of loyalty and care, borrowed from the common law, but also as a result of more specific trustee duties itemized in the Act. For example, the Act's minimum reporting and disclosure standards require benefit plans to furnish all participants with various documents informing them of their rights and

> obligations under the plan. . . ." Central States, Southeast & Southwest Areas Pension Fund v Central Transport, Inc., 472 US 559, 570- 572, 105 S Ct 2833, 86 L Ed2d 447 (1985);

While other types of fiduciaries have obligations which run only to current employees, the Plan fiduciary's duty extends to plan participants and beneficiaries. Ibid, at 576-577; Schneider Moving & Storage Co. v Robbins, 466 US 364, 373, 375, n 22, 104 S Ct 1844, 80 L Ed2d 366(1984) The common law of trusts includes the Trustees' duty of loyalty wherein the fiduciary:

> "is under a duty of loyalty to the beneficiary to administer the trust solely in the interest of the beneficiary. The Trustee, in dealing with the beneficiary on the trustee's own account is under a duty to the beneficiary to deal fairly with him and to communicate to him all material facts in connection with the transaction which the trustee knows or should know." Restatement Trusts, Sec. 170(1)(2); Evans v Bexley, 750 F2d 1498(11th Cir., 1985)

He is under a duty to the beneficiary to give him on request, complete and accurate information as to the nature and amount of the trust property. Restatement, Sec. 173. He cannot act dishonestly, with improper motive or to the prejudice of a beneficiary's interest. Ibid. Sec.

187(f), (g). The Trustee is bound to the beneficiary any knowledge he may have affecting the beneficiary's interest. **Kelsey v Detroit Trust Co.**, 265 Mich 358(1934); **Hertz v Miklowski**, 326 Mich 697(1950)

Failure to disclose is a ERISA breach of the fiduciary duty. **Genter v Acme Scale & Supply Co.**, 776 F2d 298(7th Cir, 1985); **Hepler v CBS, Inc.**, 696 F2d 596 (1985). The action of the fiduciary is subject to the same arbitrary and caprice standards of judicial review as under the Labor Management Relations Act, 29 USC 185. **Gorden v ILWW-PMA Benefit Fund**, 616 F2d 433(9th Cir., 1980). The trustee must exercise discretion to serve the interests of all the participants and is forbidden from granting preference as between the plan's participants and its beneficiaries. **Talarico v United Furniture Workers Pension Fund**, 479 F Supp 1072 (DC Neb, 1979); **Winpisinger v Aurora Corp.**, 456 F Supp 559 (ND Ohio, 1978). There is no merit to the view that a "business judgment" test should govern review of the Trustee's decisions. Donovan v

Mazzola, 716 F2d 1226 (9th Cir, 1983)

Defendant placed itself in the position where its acts against these Petitioners benefited it as it contributed less to the fund and to retiring Petitioners because it rationalized that it was paying too much salary to its "seasoned" employees. When Wyatt showed Defendant its options, Defendant selected the options whereby it not only reduced the size of its payroll, but saved on the payout to the plan beneficiaries. **Dooley v American Airlines, Inc.**, 797 F2d 1447, 1450-53 (7th Cir., 1986) Thus, if Petitioners prove what the evidence shows, Defendant breached its fiduciary duties to them.

Genter v Acme Sale and Supply Co., supra., holds, "Representations made in a fiduciary capacity must not have the effect of misleading or misinforming plan participants." The evidence shows Defendant misled or misinformed plan participants. **Ogden v Michigan Bell Telephone Co.**, 657 F Supp 328 (ED, Mich, 1987) holds that 29 USC 1104:

> "imposes an unwavering duty to make decisions with single minded devotion to a

> plan's participants. . . ."[cite omitted] Representations made in a fiduciary capacity must not have the effect of misleading or misinforming plan participants, nor can necessary information be withheld.[cite omitted]
>
> * * * * * *
>
> Fiduciaries have a duty `to avoid placing themselves in a position where their acts as officers or directors of the corporation will prevent their functioning with complete loyalty demanded of them as trustees of a pension plan" |**Amato v Western Union Intern**, Inc., 773 F2d 1402, 1417,(2nd Cir., 1985, Cert denied, ___U.S.___, 106 S Ct 1167, 89 LEd2d 288. This may require the fiduciary to step aside in favor of a neutral referee, or at least to conduct an inquiry into the potential for a conflict of interest. **McMahon v McDowell**, 794 F2d 100(3rd Cir., 1986), cert denied, ___U.S. , 107 S Ct. 473, 93 LEd2d 417

Defendant below, relied on **Dooley v American Airlines**, Inc., 797 F2d 1447, 1450-53(7th Cir., 1986), but such reliance is misplaced. The most salient fact in **Dooley** is that American Airlines disclosed the changes in the interest discount rates by a written bulletin. This Defendant did all it could to hide the fact that it switched the interest discount rate.

Dooley is otherwise distinguishable, including timely approval of Plan modification obtained by American. Here, Defendant took no action to amend its Plan allowing for a changed

formula until years after the fact.

29 USC 1102(b)(4) commands that every employee benefit shall specify the basis "on which payments are made to and from the plan." IRS Revenue Ruling 74-385, 1974-2 C.B. 130 and Treasury Regulation 1-401-1(b)(1)(i) require that for a Plan to qualify, it must provide for definitely determinable benefits, a requirement that is met when the level of benefits is computed by a fixed formula not within the discretion of the employer. These provisions were in effect well before Revenue Ruling 79-90, which basically required plans to state assumptions within the plan and precluded employer discretion. Defendant did not adopt SERO until after 1982, and the employer exercised discretion to the detriment of the plan participants. Thus, Petitioners' actuary testified that Defendant's acts were arbitrary, capricious and, as to the use of the assumptions, against the spirit of Revenue Ruling 79-90, which should have been known by it for over a year.

Thus, if Petitioners prove what the

evidence shows, Defendant breached its fiduciary duties to the Plan's beneficiaries in many different ways, even if Revenue Ruling 79-90 is inapplicable to the Defendant's behavior when it offered SERO. At best, though the evidence before the lower Courts was clear and convincing: Defendant breached its fiduciary duty, fact questions exist whether those breaches occurred and, if the breaches of fiduciary duty damaged the Petitioners, their cause is actionable under 29 USC 1132(a)(1)(B). The District Court erred in granting Summary Judgment. The United States Court Of Appeals For The Sixth Circuit erred in affirming that judgment.

(2) Defendant's Misconduct Harmed Petitioners.

A fraudulent representation made for the purpose of inducing one to make a contract will void it. **Paquin v Van Houtum.** 343 Mich 111, 118, 72 NW2d 169 (1955); **Phoenix Mutual Life Insurance Co. v Bailey,** 13 Wall 616, 20 LEd 501; **United States v American Bell Telephone Co.,** 128 US 315, 9 S Ct 90, 32 L Ed 450; **Paquin v Van Houtum,** 343 Mich 111, 72 NW2d 16 This tenet applies, even

though the fraud succeeds due to the defrauded party's own negligence. **Komraus Plumbing & Heating, Inc. v Cadillac Sands Motel, Inc.**, 31 Mich App 674, 679, 187 NW2d 920 (1971)

A binding contract is consummated between parties if a party is defrauded into entering the contract. Ibid., 31 Mich App at 680. Here, Petitioners were not negligent. They tried to obtain information but Defendant hid it from them. Petitioners have the option of voiding their contract accepting the SERO or affirming the contract and seeking damages. **Paquin v Van Houtum.** 343 Mich 111, 121, 72 NW2d 169 (1955)

In **Rzepka v Farm Estates, Inc.**, 83 Mich App 702 (1978), the Court said:

> "Consequently, assuming . . . a duty of disclosure . . . . failure to disclose these facts . . . is tantamount to a representation that the corporation was solvent. Such representation was clearly false; and . . . [the] . . .director of the corporation obviously knew the representation was false. Such a misrepresentation is clearly material as bearing upon a fact crucial to Locke's decision to buy . . . . . [cite omitted] . . . . We find reliance here where facts are not disclosed are of the sort that would have induced plaintiff not to have acted had he known of them . . ."

In this case, Petitioners relied upon the

misinformation, in one Petitioners' case, or Defendant's refusal to answer in another's. The reason Petitioners made inquiry was to determine whether or not they would elect the SERO. If Petitioners were told that they would have obtained substantially higher benefits if they continued business as usual, they would not have elected the SERO. (R 53: Deposition of Richard Richardson, June 22, 1987, Tr. at pp. 36-39)

Paquin v Van Houtum. 343 Mich 111, 121-123, 72 NW2d 169 (1955), establishes the measure of damages as:

> "Defendant's contention that by retaining possession plaintiffs have estopped themselves from recovering in this suit in not well founded. They had the right of affirming the contract and of seeking redress in damages"
>
> * * * * * *
>
> "The great weight of authority sustains the general rule that a person acquiring property . . . who has been defrauded by false misrepresentation as to the value . . . of the property may recover as damages . . . the difference between the actual value of the property at the time of making the contract and the value that it would have possessed if the representations had been true. . . . [T]he defrauded party is entitled to recover the difference between the real and the represented value." In accord: **D'Alessandro v Vander Hooning**, 365 Mich 66 (1961); **Chapman v Bible**, 171 Mich 663 (1912);

Gross v Morosky, 366 Mich 114, 116 (1962)

Defendant misrepresented to Petitioners that they would receive unreduced benefits. Then, Defendant refused to disclose relevant information even though it was asked specific questions. Further, Defendant, although it disclosed some information, purposely disclosed false information. In addition, while representing to Petitioners that they were receiving unreduced benefits, Defendant changed the discount factor from a 6% reduction factor to 10% without disclosing same (and without reporting same as required by ERISA) An expert testified that the true unreduced benefit rate would have been higher by about $250,000 each at the time this action was commenced. [1] Such is the amount that Defendant hid from Petitioners and it is the measure of Petitioners' damages.

Petitioners can show a breach of fiduciary duty. They can show damages. They are entitled to relief under ERISA, 29 USC 1132(a)(1)(B).

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1. The computation differs somewhat as different factors apply to each Appellant.

Farrell v Automobile Club of Michigan, 870 F2d 1129, 1133-34 (6th Cir., 1989); supra.

B.

THE APPELLATE COURT'S DECISION ANNULS THE PROVISIONS OF 29 USC SECTION 1132(a)(B) WHEN BENEFICIARIES SEEK TO RECOVER BENEFITS LOST BY THEM DUE TO THE FIDUCIARY'S MISREPRESENTATIONS

The decision of the Court Of Appeals would make the provisions of 29 USC Section 1132(a)(b) a nullity when a beneficiary seeks to recover its benefits lost due to the plan fiduciary's misrepresentations. Petitioners seek to recover the benefits they so lost. ERISA, 29 USC 1132(a)(1)(B) provides that "A civil action may be brought- (1) by a . . .beneficiary- (B) to recover benefits due to him under the terms of his plan. . . ." 29 USC 1109 states:

> "Any person who is a fiduciary. . . who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem

appropriate, including removal of such fiduciary.(emphasis is mine)

It is clear that Section 1109 deals with remedies for the plan itself while 1132(a)(1)(b) deals with remedies for the beneficiary who seeks to recover benefits denied him in some manner. In **Massachusetts Mutual Life Insurance Co. v Russell**, 473 US 134, 144, 105 S Ct 3085, 87 L Ed2d 96(1985), this Court held that under 1109(a) ". . . Congress did not intend. . . to authorize any relief except for the plan itself."

This Court held that recovery under 1109(a) was for the plan itself and that no private action under that section existed on behalf of plan beneficiaries. Ibid at 148.

This Court examined six civil actions available under ERISA provisions, including 29 USC 1132(a)(1)(A) if the plan administrator refused to supply requested information; 1132(a)(1)(B) to recover benefits due; and 1132(a)(2), the action against the fiduciary.

This court, examining the potential relief available to a Plaintiff, stated,

"To recover the benefits due he, she could

> have filed an action pursuant to Section 502(a)(1)(B). . . [1132(a)(1)(B). . .to recover accrued benefits, to obtain declaratory judgment that she is entitled to benefits under the provisions of the plan contract, and to enjoin the plan administrator from improperly refusing to pay benefits in the future. If the plan administrator's refusal . . .had been willful and part of a larger systematic breach of fiduciary obligations, respondent in this hypothetical could have asked for removal of the fiduciary. . . . 473 US at 146, 147

Thus it is clear that Petitioners had the right to bring their law suit in either a State court or in a Federal District Court under the language of 29 USC 1132(e) to obtain the benefits of which Defendant deprived them. Defendant wore three hats: Plan Fiduciary, Plan Administrator and the Petitioners' employer. Petitioners could not have brought an action to obtain these benefits under any other section of the statute. Yet, the statutory purpose is to afford a remedy to plan beneficiaries for benefits due to the beneficiary. The statute does not categorize the method by which the benefits become due the beneficiary.

To read, as did the District Court and the Court of Appeals, a bar to the beneficiary-

Petitioners' recovery because the method by which they lost their benefits was by the fiduciary's misbehavior, is a strained reading of the statute at best. Not only does this interpretation encourage such conduct by fiduciaries in the future, but vitiates Congress' intent and purpose in enacting the statute. (See supra.)

C.

THE APPELLATE COURT DECISION EFFECTIVELY REWARDS AN ADMINISTRATOR'S FAILURE TO REPORT REQUIRED INFORMATION TO PARTICIPANTS, ENCOURAGE DISREGARD OF STATUTORY PROVISIONS INTENDED TO INFORM PARTICIPANTS OF CHANGES IN THEIR PLAN; IT ENCOURAGES ADMINISTRATOR ACTS THAT UNDERMINE THE INTENT OF THE STATUTE

1.

THE LOWER COURT ERRED IN HOLDING DEFENDANT'S PLAN COMPLIED WITH ERISA REQUIREMENTS OR, TO THE EXTENT THAT DEFENDANT FAILED TO COMPLY WITH THE STATUTE, THE PETITIONERS' SUFFERED NO PREJUDICE

On July 13, 1989, the District Court entertained argument on Defendant's Motion for Summary Judgment. The Court decided to follow

Dooley v American Airlines, supra. and stated that the Dooley Court presented a three-step analysis: (1) that the language of the Plan allowed the Administrator to change the Plan's interest rate; (2) Whether such employer discretion violated public policy; and (3) Did the changes made by the Plan Administrator result in actuarial equivalency.[1] (Tr. of Proceedings, July 13, 1989, at pp. 6-8) The Court made rulings partially granting and partially denying Defendant's motion. The Court stated:

> "Petitioners . . . make an unexplained reference to a statutorily-required filing which they claim Defendant failed to make. . . in this matter.
> Well, this dispute . . . seems to me to create a genuine issue of material fact. The plain language quoted by the Defendant is not completely clear on its face in its approval of actuarial tables and interest rates `last adopted' by the Employers and their actuaries, in that there is no definition of what constitutes adoption. It is not clear to this Court whether the employer's Board must adopt new tables, nor is it clear whether the Board did so in this case.
> Alternatively, this crosses the Court's mind, must the Plan itself be amended before a change be made, is informal adoption

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1. The Dooley case is distinguished on its facts from the facts present in this case, supra. at pp. 23-24

adequate, what procedures or actions were in fact taken in this particular instance?
So then . . . until this Court has been more thoroughly briefed, frankly on what procedures were required either by the Plan or by law, as well as to what procedures were actually taken prior to the Defendant offering this SERO, this Court simply cannot rule as to whether or not the Plan authorized the discretionary actions taken by the Defendant in this case. (Tr. of Proceedings, July 13, 1989 at pp. 10-12) [emphasis is mine]

On November 30, 1989, the Court addressed Defendant's violations of the statute as follows:

"Courts have held at other times and other places that a plaintiff has no right to an equitable remedy for procedural violations under ERISA, unless he has thereby been prejudiced. . . . [T]his Court finds that in this case, the plaintiffs have failed to show any injury from Defendant's alleged failure to comply with the letter of its Plan. The plaintiffs have not, for example, shown that if the defendant had informed them specifically of the ten percent factor, rather than simply calculating their benefits for them, that Plaintiffs would have declined the SERO, nor have plaintiffs shown the SERO was not advantageous compared to the regular plan. . . . [T]he plaintiffs have merely shown that it would have been more advantageous had the defendant kept the six percent factor.
This does not constitute an injury under ERISA." (Ibid., at pp. 27-28)

On the one hand, the District Court dismissed Petitioners' case that showed the injury suffered by Defendant's breach of

fiduciary duty in July, and in November treats Defendant's failures to comply with statutory requirements as harmless acts because Petitioners can no longer show prejudice. Further, if Petitioners would have continued work knowing of the effect of Plan changes is a question of fact.

When Defendant blends two different kinds of benefits into one benefit amount, it is impossible for those not familiar with the underlying actuarial assumptions, like Petitioners, to understand what they are getting. If, at least, the changes in assumptions are disclosed, Petitioners are able to know they must either seek independent advice or ask Defendant additional questions.

This law suit is based in part on Petitioners obtaining relief from being intentionally misinformed as to what they were getting. The very purpose of asking the questions they asked was for them to make informed decisions. Appellant Richardson, for example, never would have selected the SERO had he been informed that he would receive a much

higher lump sum amount if he were to work but a few more years.(R 53: Tr. of The Deposition of Richard Richardson, June 22, 1987, at pp. 36-37)

Defendant failed to comply with ERISA's filing requirements and such compliance, or other means of giving notice to Petitioners of changes that ERISA requires filings or notice of, would have put Petitioners on notice and they would have made further inquiry.

ERISA imposes great demands on its Plan administrators and fiduciaries. 29 USC 1021(b) requires that the administrator of a Plan file plan descriptions, modifications and changes in reports filed with the Secretary of Labor.

29 USC 1022(a)(1) requires a summary plan description of any employee benefit plan be furnished to plan participants and beneficiaries, said summary to be written in a manner calculated to be understood by the average plan participant and which shall be sufficiently accurate and comprehensive to apprise the participants and beneficiaries of their rights under the Plan.

The same section of ERISA requires that "A

summary of any material modification of the plan" shall be written in a manner to be calculated to be understood by the average plan participant, and, further, 29 USC 1022(b) requires that any "material change in the terms of the plan . . . shall be filed" with the Secretary of Labor.

29 USC 1023(a) requires an annual report be filed with the Secretary and, in addition, given to Plan participants, while 29 USC 1023(b) requires filing a financial statement containing [at 29 USC 1023(b)(2)] "a description of the plan including any significant changes in the plan made during the period and the impact of such changes on benefits . . . and . . . a description of any significant changes in plan benefits made during the period." [emphasis is mine]

Defendant's existing Plan was changed by altering the actuarial discount rate and by the addition of a new kind of benefit. These changes were effectuated by Plan amendment. The first change greatly reduced the benefits a person electing a lump sum would receive, while the second change added whole new tiers of benefits

to the Plan. One can hardly say that this kind of sweeping benefit changes lacked significance, at least to those who were put into a position to elect the changed benefits.

29 USC 1023(d)(3) and (10) requires the filing of actuarial assumptions. No one disputes that Petitioners are highly intelligent, skilled and motivated people. They were Defendant's upper level management employees. But the District Court said, "In most cases, we assume that disclosure of the dollar amount would be more useful information than disclosure of the discount factor to be used for most lay employees, information regarding discount factors, actuarial equivalence and mortality assumptions is too arcane to be really useful to the employee in making retirement decisions." (Tr. of Proceedings, Nov. 30, 1989 at p. 23)

The District Court assumed facts contrary to evidence before it. Not only does ERISA require Defendant perform acts and give notices, which Defendant failed to do, but Petitioners are the kind of employees to whom such information

would be useful, at least spurring them to further inquiry.

The Court also erred when it stated "Furthermore, the defendant in essence let the plaintiff know it had adopted the ten percent discount factor insofar as the defendant laid out for each plaintiff what his regular lump sum equivalent would be compared to the SERO monthly benefit and the lump sum equivalent of his SERO monthly benefit." Petitioners respectfully submit that the opposite is true; that once all actuarial factors are applied and benefit amounts arrived at, methodology used is hidden from view and the beneficiary has no way of knowing what discount interest factor was used and what benefit would have been available had a discount fact in then current use been used instead.

29 USC 1024(a), (b) requires filings with the Secretary of Labor and furnishing each beneficiary or participant in a Plan a summary description of any change within a stated period of time.

On March 12, 1987, Defendant answered

Interrogatories. (R 9: DEFENDANT'S ANSWERS TO PLAINTIFFS' FIRST SET OF INTERROGATORIES, Interrogatory 54) Its answer was as follows:

> Q. "Was a Summary of Material Modification filed with the United States Department of Labor regarding the `Special Early Retirement Supplement?'" A "No."

The fact is that Defendant failed to comply with ERISA's filing and notice requirements concerning substantial matters, ie., actuarial changes in the manner in which Defendant applied the UP-10% rate to the lump sum payments under the modified Plan for SERO and the change from the UP-1984-6% formula formerly used for lump sum reduction calculations to the UP-1984-10% formula used by Defendant when it offered its SERO. The fact was that the SERO and the reduction factors were modifications to the Plan, should have been reported by the Defendant and notice given to Petitioners.

These were material changes affecting the participants and beneficiaries' benefits. They were not reported or disclosed. A statutory purpose of notification is to enable Plan participants and beneficiaries to make informed

decisions or to put them on notice that they have questions to ask. Defendant frustrated a statutory purpose and actively misled Petitioners into making uninformed, undesired elections.

The modifications to the Plan were not reported, notice to Plan participants or beneficiaries was not given, according to statutory requirements, requirements enacted by Congress to give persons like Petitioners notice that something different was happening, thereby giving them the opportunity to gain information or ask questions about how the changes affected them. In this case, the manner in which the benefits would be calculated cost them hundreds of thousands of dollars.

The very purpose of ERISA's reporting and disclosure provisions is to avoid the kind of situation in which Petitioners find themselves, having benefits calculated in a hidden manner, depriving them of the opportunity of the basis on which to make a rational decision affecting the rest of their lives.

THE COURT ERRED IN HOLDING THAT DEFENDANT'S PLAN'S LANGUAGE ALLOWED ITS ADMINISTRATOR TO CHANGE ITS PLAN'S RATE WITHOUT AMENDMENT

The Lower Courts held that Defendant's Plan allowed its administrator to change the interest benefit discount rate and that "any violation on the part of defendant was simply a technical procedural violation of its own plan." (Tr. of Proceedings, Nov. 30, 1989, pp. 23-27)

The Plan did not authorize the adoption of the new UP-1984-10% formula. The SERO was comprised of two benefits: (1) The regular accrued benefit which was calculated and converted into a lump sum amount by using the table prescribed by the Plan, ie., an actuarial assumption referred to as UP-1984-6%; and (2) A supplemental benefit, which rather than being converted into a lump sum equivalent like the regular accrued benefit, was converted into a lump sum by using another actuarial assumption referred to as UP-1984-10%.

It is only as to the supplement portion of the benefit that Defendant became suddenly aware

of its fiduciary duties to all of its employees and tried to make that benefit what it calls an actuarial equivalent. If we are to believe Defendant, it put itself into the absurd position of offering a SERO that was partially actuarially equivalent and partially not. It then claims that it took all steps provided by its Plan to create this two-headed snake. Of course, if it had properly amended its Plan, made proper statutory filings and given statutory notices, it could have amended its Plan so that the entire lump sum election could be actuarial equivalent. This is an internal contradiction in Defendant's position and the lower Courts abused their discretion by finding in Defendant's favor.

There are several relevant components to the Plan to guide our inquiry. First, the Plan's Twenty-First Amendment and Restatement of the Plan was adopted on September 28, 1978. (R 93: **DEFENDANT'S REVISED MOTION FOR SUMMARY JUDGMENT, Attachment at page 1**) At Article II, Section 14 (Ibid,, Attachment at page 5), It defines the term "Actuarial Equivalent" as "a benefit of

equivalent value when computed on the basis of such actuarial tables and interest rates as were last adopted for this purpose by the employers and their actuaries . . . ." [emphasis is mine]

Petitioners were offered a lump sum payment, though the terms of that payment were altered to induce them to accept early retirement. Actuarial tables and interest rates last adopted for lump sum payoff by the Plan in 1980 was UP-1984-6%. That is not a disputed fact.

The Twenty-Second Amendment to the Plan was adopted by the Defendant on January 1, 1979, effective July 1, 1980, an effective date correspondence to the Defendant's SERO offer to the Petitioners. Article II, Section 14, is not redefined in that Amendment. Ibid.)

The Twenty-First Amendment and Restatement of the Plan, Article V, Section 5 (R 93: DEFENDANT'S REVISED MOTION FOR SUMMARY JUDGMENT , at p. 20 of the Amendment and (b) p. 21 of the Amendment) refers to the method of Participants' acceptance of early retirement. None of the

options refer to a SERO, but Option F (Ibid., at p. 23 of the Amendment) allows "such other actuarially equivalent option or options as shall be made available by the Committee on a uniform and nondiscriminatory basis." The Amendment fails to approve of or provide a methodology which allows Defendant to combine regular accrued benefits computed on the basis of one interest rate deduction with a supplement computed at another. If the regular accrued benefits were offered, they would be discriminatory as against monthly beneficiaries by Defendant's story. Even if combined with another component, the benefit would be discriminatory, putting Defendant's actions at odds with its Plan.

The definition of "actuarial equivalent" remained unchanged from its definition at Article II, Section j 14, "a benefit of equivalent value when computed on the basis of such actuarial tables and interest rates as were last adopted for this purpose by the employers and their actuaries . . . ." [emphasis is mine]

As shown above, the Twenty-Second Amendment

did not change that definition, but it did add Article V, Section 2A, which is entitled Supplemental Early, Normal or Deferred Retirement Benefit,. (R 93: DEFENDANT'S REVISED MOTION FOR SUMMARY JUDGMENT, Twenty-Second Amendment, attachment, at p. 7) The language in this Amendment almost tracts the language of Defendant's Certification of Board Of Governor's Activities at June 24, 1980 Meeting. (R 93: DEFENDANT'S REVISED MOTION FOR SUMMARY JUDGMENT, Exhibit 5) Indeed, both are devoid of any reference to actuarial equivalences.

Defendant's response to Interrogatory 7 (R 33: PLAINTIFFS' SECOND SET OF INTERROGATORIES),

Q. . . . IDENTIFY the writing that led to the use of UP-1984 and a 10% interest assumption in the calculation of the benefits for the Special Early Retirement Offer.

A.: There was no one document that led to the use of UP-1984 and the 10% interest assumption. The 22nd Amendment to the Salaried Employee Retirement Plan authorized the option of receiving a lump sum payment equal to the actuarial value of the monthly benefits."

Interrogatory 8 asked:

Q. "Were any of the Retirement Plan Participants advised that the actuarial assumptions used calculating the 1980 Special Early Retirement

Offer were significantly different from the actuarial assumption used to calculate lump sum values for ongoing plan participants?" A. "No."

Interrogatory 11 asked:

Q. "IDENTIFY . . . provide the full actuarial report prepared by the Wyatt Company concerning the 1980 Special Early Retirement Offer."
A. "No special actuarial report was prepared by the Wyatt Company regarding the 1980 Special Early Retirement Offer."

Attached to those Answers were two letters to the Defendant from Wyatt, its actuary, one dated April 17, (Ibid., exhibit 2) and another, April 25, 1980 (Ibid., Ex. 3) The letters show Defendant's actuary did not propose or recommend any discount interest rate. One letter tells us that the "Plan presently allows an employee to elect a lump sum benefit in lieu of his monthly accrued retirement benefit. The factors for this option are written in the Plan document and are the actuarial equivalent factors based on 6% interest of a benefit deferred to age 65."

Another shows values if a combination of interest factors were used in different types of SERO benefits. However, it is not until the Twenty-Fourth Amendment And Restatement Of The

Plan, effective date July 1, 1982 that the definition of "Actuarial Equivalent" changed, and then it was defined as UP-1984-5 and 1/2% interest. (R 93: DEFENDANT'S REVISED MOTION FOR SUMMARY JUDGMENT, Page 2 of the Plan). Defendant provided a document that chronologically describes amendments to the Plan. (R 93: DEFENDANT'S REVISED MOTION FOR JUDGMENT, Exhibit 6) The only reference to actuarial assumptions occurs after 1981.

These documents fly in the face of the Defendant's personnel manager's affidavit. (Ibid., Ex. 1) Petitioners' actuary, Craig Arnold's testimony also disputes the Affidavits submitted by Defendant.

On June 26, 1987, Mr. Arnold was deposed. (R 51: Deposition of Craig Arnold, June 26, 1987)) He was asked some technical questions commencing at page 36 of that deposition. When combined with his answers later in the deposition, at page 87, we see that his testimony is that there was no authorization in the Plan either for using the UP-1984-10% assumption or

for combining the 1984-10% interest factor with the 1984-6% factor.

When asked about his technical opinions, Mr. Arnold responds:

> "The first relates to the explicit actuarial census used for evaluating all of part of the special supplement benefits, which were a part of the offer. . . . [M]y first general concern is that in looking at the legal authority and basis for making such a determination and placing a value, based upon actuarial assumptions, I turned to the actual plan documents and memos themselves to search for appropriate authority as to how . . . .whomever calculated the benefits proceeded. My starting point is the 24th Amendment. . . . With respect to the 24th Amendment, item number 11 thereunder, there is set forth rather carefully, the use of UP-84. . . ten percent interest assumption for certain supplemental benefits which were being offered to certain classes of eligible employees. However, in searching for the effective date of that 24th Amendment authorizing the use of those assumptions. . . I find that the effective date is July 1, 1982 . . . relating that back to a prior amendment which was the 22nd amendment . . . bearing an effective date of January 1, 1980, Section 7 thereunder refers to the replacement of an outdated lump sum factor, Table A, and a former Table B. . . and expanded to age 70. However, upon further review, I note that it's only effective for those plan participants retiring prior to 7-1-80." (Ibid, at pp 37-39)

* * * * * *

The question is as follows: The Defendant provided the Richardson Plaintiff a comparative report describing his options as of January 1, 1981, said comparative report had been provided. Defendant, identified the

actuarial assumptions used to calculate a lump sum cash benefit under A-4 and B-3 of this report. I notice the Answer is as follows: `The figure shown as A-4 as calculated using a lump sum factor from Table A, included an article for section four, paragraph, sub D of the retirement plan. . . .' Well, we know from previous testimony that certain actuarial assumptions were approved as of that date and others were not. Further, it continues a six percent interest assumption is the underlying interest basis used for developing the table but it doesn't tell us what the other assumptions are. Any actuary making projections of lump sum cash value as under A-4 and B-3 need to have more than one assumption. They just don't use interest. They have a mortality assumption. Its not referred to here. . . . And I guess that underscores my general concern with the use, partial use of UP-84, 10% interest in the calculation of all or part of the authoritative statement provided to eligible plan participant(s)." Ibid,, at pp. 85-87

Thus Defendant used a combination of interest factors, without authorization and disclosed but one. There was no Plan authority for Defendant to use UP-84-10%, let alone a combination of interest discount factors.

The expert's deposition was continued. (R 55: Continuing Deposition of Craig Arnold, Aug. 7, 1987) He discussed the inconsistencies between Defendant's Answer to Interrogatory 11, supra., and what he was able to observe from the documents. (Ibid,, pp 15-19, pp. 45--47). He

points to the lack of authority for use of the UP-84-10%. (Ibid., at pp. 20-21)

Then, Mr. Arnold testifies about the inconsistency in Defendant's position:

> "I refer to the Wyatt. . .'s letters which. . . dealt with the possibility of using six percent versus ten percent. . . and essentially they're saying Gee, if we base it on six percent like we have in the past these people are going to walk away with more money. Let's use ten percent because we can s-a-v-e, save money. . . . What is the rational. . . .[L]ong-term bonds are yielding about that right now. But the inconsistency seems to be. . .that there's no need to change the long term--the assumption on long term earnings because. . .this is a short-term aberration where interest rates are. . . peeked up but they'll probably back down. There really is no need to change interest assumptions" Ibid, at 60-61 [my emphasis]

While here the witness says that the Defendant acted in its own interest to save itself money, then when looking back at matters, created its rationale, later in his deposition the witness wonders as to why the Defendant tries to break apart the special supplement and the base plan when the approved plan itself is but one defined benefit plan. (Ibid., at 79-80), and then Mr. Arnold testifies:

Q. " What we're talking about are the supplemental benefits."
A. All right. Noting that then, it is my understanding that the supplemental benefit provided. . . were predicted upon use of UP-84-10 percent interest. . . . My general impression is that at that time . . . we were experiencing increases in the marketplace . . . . income. rates of return in the marketplace. . . . it was a period of. . .an aberration, a short period of time which we found in the financial marketplaces that rates, fixed income rates had dramatically increased. . . . I would like to make reference to the Wyatt actuarial report dated July 1, 1980 . . . signed by Mr. Green, who, of course, was the consulting actuary by Wyatt . . . . the subject being what rates do we use, the 10 percent rate or the six percent rate. . . . [T]he Wyatt Company was asked by the . . .Defendant to review alternate actuarial assumptions with respect to the funding of this plan. The ongoing assumptions from an investment standpoint had been at 5.5 percent. Apparently there was some consideration given to changing actuarial funding assumptions on the investment category as high as 6.5 percent. However, Mr. Green concludes, `We do not see any pressing need to change assumptions at this time.'

I would conclude that the use of 10 percent as an investment assumption or an interest assumption was highly unusual. . . .

. . . .[I]n pension plan benefits and in the funding. . . all considerations, pension plans are not viewed in narrow time horizons, That is plans generally do not relate to quick changes or aberrations in the fixed income market. . . . A plan by its very nature is long-term and it has to be considered in that light. And in fact, the actuary who was intrinsically involved with the consideration of whether or not to use six or whether or not to use 10, chose in that year's actuarial report to stay the

course on a reasonable rate of interest. . . ." (Ibid., at pp 82-86

Defendant failed to properly report its changes, either to the government or to the plan participants or beneficiaries. Defendant made changes in the Plan not authorized by the Plan

D.

THE DECISION OF THE COURT OF APPEALS IS CLEARLY ERRONEOUS IN NOT EXERCISING PENDENT JURISDICTION OVER THE PETITIONERS' STATE CLAIMS.

The lower court erred in failing to exercise pendent jurisdiction over the petitioners' state age discrimination claims. Two factors exist concerning the issue whether the lower Courts should retain its pendent jurisdiction. **United Mine Workers v Gibbs**, 383 US 715, 725, 86 S Ct 1130, 16 L ed2d 218, 227(1966); **Levering & Garrigues Co. v Morrin**, 289 US 102, 53 S Ct 549, 77 L Ed 1062.

Here, substantial federal claims exist, and the state and federal claims derive from a common nucleus of operative fact.

CONCLUSION

For the foregoing reasons, this Petition

for a Writ of Certiorari should be granted.

Respectfully submitted,

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August 7, 1991

APPENDIX A

OPINIONS OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT OF MARCH 1, 1991 AND MARCH 28, 1989 AND SUPPORTING DISTRICT COURT ORDERS

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

KEITH FARRELL, WILLIAM MURRAY
and RICHARD RICHARDSON.

Plaintiffs,

v.

No-86-CV-35IS-DT

AUTOMOBILE CLUB OF MICHIGAN Hon. George E. Woods

Defendant. Motion

MEMORANDUM OPINION AND ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT ON PLAINTIFFS' ERISA CLAIM AND DISMISSING WITHOUT PREJUDICE PLAINTIFFS' REMAINING PENDENT STATE CLAIMS

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 17th day of December, 1987.

PRESENT: THE HONORABLE GEORGE E. WOODS
United States District Judge

Each of the three plaintiffs, Keith Farrell, William Murray, and Richard Richardson, were long-term managers

employed by defendant Automobile Club of Michigan. All three employees "accepted" a special early retirement offer (SERO), which defendant between July I and December 31, 1980 made available to its employees 55 years of age or older. Plaintiffs allege that defendant misrepresented that the SERO program was financially advantageous in comparison to the regular retirement plan. Plaintiffs seek recovery for defendant's alleged violation of ERISA (count I), breach of employment contract (count II and age discrimination under Michigan's Elliot-Larsen Civil Rights Act (count III). Defendant moves for dismissal and/or summary judgment on all three counts.

I. ERISA

Defendant moves for summary judgment on plaintiffs' ERISA claim as barred by ERISA's three-year statute of limitations. Section 413 of ERISA, 29 U.S.C. Section 1113(a),provides that no action based on a fiduciary's breach of duty may be brought after the earlier of (1) six years after the date of the breach or

> (2) three years after the earliest date (A) on which the plaintiff had actual knowledge of breach or violation, or (B) on which a report from which he could reasonably be expected to have obtained knowledge of such breach or violation was filed with the Secretary under this title; except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation (emphasis added)

Defendant offers evidence showing that all three plaintiffs had actual knowledge of defendant's alleged ERISA violation prior to

August 22, 1983 (i.e., three years before plaintiffs filed this action). Richardson testified in his deposition that he met with Murray at Murray's home during the first or second quarter of 1982 to advise Murray that he intended to retain an attorney to sue defendant. He showed Murray a chart and documents he assembled that, in Richardson's view, proved that defendant did not pay him for all vested benefits. Richardson informed Murray that he would be encouraging others to join in the planned litigation and suggested that Murray likewise think about his vested benefits. Richardson additionally visited Farrell's Traverse City home between January and April of 1982. Richardson at that time showed Farrell the documents and asked to join in the litigation.

Farrell gave similar testimony. He recalled meeting with Richardson during the winter of 1982. He reviewed Richardson's chart indicating that the benefits chosen in the SERO program were not computed accurately by defendant. Significantly, Farrell admitted that

the only basis for his claim that defendant improperly computed the lump sum benefits was the information Richardson provided him in 1982.

Murray recalls meeting with Richardson in late 1981. They discussed soliciting others for the litigation. Murray states that he and Richardson met Farrell at Farrell's Traverse City residence and discussed whether to bring an action against defendant.

Further evidence of plaintiffs' actual knowledge is found in their filing of a suit against defendant in the Wayne County Circuit Court on August 30, 1983. The complaint filed in that court is identical to the complaint filed in this action. Defendants, in fact, filed this action only after defendant moved for summary disposition in the circuit court proceeding. [1]

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1. In January of this year, the Wayne County Circuit Court ruled on defendant's motion for summary judgment and dismissed plaintiffs' ERISA claims as preempted. That court also dismissed part of plaintiffs' age discrimination claims.

Plaintiffs argue that the filing of the circuit court proceeding tolled the statute of limitations. That argument is without merit.

In short, defendant is entitled to summary judgment on plaintiffs' ERISA claim as barred under the three-year statute of limitations.

II. PENDENT STATE CLAIMS

A court has power to hear a pendent state claim when (1) a substantial federal claim exists; (2) the federal and state claims derive from a common nucleus of operative fact; and (3) the claims are such that a plaintiff would ordinarily be expected to try them all in one judicial proceeding. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). Plaintiffs fail the first element since their ERISA claim fails to present a substantial federal question. Plaintiffs also fail to satisfy the third element since they have chosen to litigate their claims

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The remaining allegations of age discrimination are still pending in that court

in both a federal and state court.

Even assuming this Court has power to hear the plaintiffs' pendent state claims, the power need not be exercised. The Gibbs Court noted that pendent jurisdiction is a discretionary doctrine. According to the Court, "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." Id. at 726 Additionally, the circuit court has entertained plaintiffs' age discrimination claims for four years and has already granted summary judgment in favor of defendant on many of plaintiffs' age discrimination allegations. There is no reason why plaintiffs should be permitted to pursue their state claims in two forums. The pendent state claims shall be dismissed without prejudice.

III. ORDER

For all of the above reasons, IT IS HEREBY ORDERED that summary judgment be GRANTED in favor

of defendant on plaintiffs' ERISA claim and that plaintiffs' pendent state law claims be DISMISSED without prejudice.

So ordered.

GEORGE E. WOODS

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

KEITH FARRELL, WILLIAM MURRAY

and RICHARD RICHARDSON.

Plaintiffs,

v. No-86-CV-35IS-DT

AUTOMOBILE CLUB OF MICHIGAN Hon. George E. Woods

Defendant.

JUDGMENT FOR DEFENDANT

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 17th day of December, 1987.

PRESENT: THE HONORA8LE GEORGE E. WOODS

United States District Judge

The Court having issued a Memorandum Opinion and Order Granting Summary Judgment in Favor of Defendant on Plaintiffs' ERISA Claim and Dismissing Without Prejudice Plaintiffs' Remaining Pendent State Claims;

IT IS HEREBY ORDERED that judgment be entered in favor of defendant on plaintiffs' ERISA claim.

so ordered.

GEORGE E. WOODS
UNITED STATES DISTRICT JUDGE

RECOMMENDED FOR FULL TEXT PUBLICATION

See, Sixth Circuit Rule 24

No. 88-1042

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KEITH FARRELL, WILLIAM MURRAY

and RICHARD RICHARDSON, On Appeal From The

Plaintiffs-Appellants, United States District

District of Michigan Court For The Eastern

District of Michigan

v.

AUTOMOBILE CLUB OF MICHIGAN,

Defendant-Appellee.

Decided and Filed March 28, 1989

Before MERRIT and GUY, Circuit Judges; and

IOHNSTONE, District Judge*

MERRITT, Circuit Judge. The issue in this ERISA and state age discrimination case is whether the District Court properly dismissed plaintiffs' ERISA claim as time barred on the grounds that (1) the plaintiffs had actual knowledge of the ERISA violation more than three years before the action was fiied and (2) that the plaintiffs' previous filing of the action in the Michigan state court

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did not toll the applicable

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*The Honomble Edward H. Johtuton United States District Judge for the Western District of Kentucky, sitting by designation.

SEE COMPUTER FOR FUTUE ENTRIES

statute of limitations because the Michigan state court "clearly lacked jurisdiction" over the ERISA claim. Plaintiffs also challenge the refusal of the District Court to assert pendent jurisdiction over their remaining state age discrimination claims. Because we believe that the Michigan court did not clearly lack jurisdiction over plaintiffs' ERISA claim and that the ERISA statute of limitations was tolled during the pendency of the state action, we reverse the District Court's ruling that plaintiffs' ERISA claim is time-barred and remand the cause to the District Court for further proceedings. We affirm, however, the District Court's refusal to assert pendent jurisdiction over the remaining state claims.

I.

Each of the three plaintiffs, Keith Farrell, William Murray and Richard Richardson, were long-term management employees of defendant, Automobile Club of Michigan. Each accepted a special early retirement package offered by defen-

dant to employees over 55 years of age between July 1 and December 30, 1980. Each claims he was induced to retire by defendant's misrepresentations that the package was financially advantageous compared to the regular retirement plan.

Plaintiffs filed suit in Michigan state court on August 30, 1983, alleging in Count I, state law fraud and deceit and breach of employment contract and in Count II, state age discrimination. On October 24, 1985, over two years later, defendants moved for summary judgment claiming, inter alia, that plaintiffs' state law claim in Count I was preempted by ERISA.

Before the state court ruled on the summary judgment motion, plaintiffs, on August 22, 1986, filed an almost identical complaint against the defendant in federal district court alleging in Count I violation of ERISA, in Count II breach of an employment contract, and in Count III state age discrimination.

No.88-1042 Farrell v Automobile Club of Michigan

Defendant moved for summary judgment and/or dismissal on all three counts alleging plaintiffs' ERISA claim was time-barred and that the court should not exercise pendent jurisdiction over the remaining state law claims.

On January 21, 1987 the state court ruled, inter alia, that plaintiffs' breach of employment contract and fraud and deceit claims were in essence, claims regarding administration of an employee benefit plan and were, therefore, preempted by ERISA. The state court, however, failed to reach the last step in the analysis-whether jurisdiction over plaintiffs' particular claims was exclusively federal or concurrent. Instead, the state court dismissed the breach of contract and fraud and deceit claim on the basis that it was preempted by ERISA.

The state court also dismissed a portion of plaintiffs' age discrimination claim. The remaining state age discrimination claim is still pending before the state court. Plaintiffs did not, however, take an interlocutory appeal on the

preemption question. The state court decision on this issue is, therefore, not final.

On December 17, 1988 the District Court ruled that plaintiffs had actual knowledge of their ERISA claim as early as 1982, that plaintiffs' federal action was filed outside the ERISA three year statute of limitations and that the previous filing in the Michigan state court did not toll the statute of limitations. The District Court, therefore, dismissed plaintiffs' ERISA claim as time-barred. The District Court also declined to exercise pendent jurisdiction over plaintiffs' remaining state claims finding that a federal question was no longer presented and that plaintiffs' identical state claims should not be allowed lo proceed simultaneously in both a federal and state forum.

II.

Both parties agree that actions for violation of ERISA may not be brought after the earlier of (1) six years after the date

of the last action which constituted the breach or violation; or (2) three years after the earliest date on which plaintiff had actual knowledge of the breach or violation; or (3) three years after the earliest date on which a report from which the plaintiff could reasonably be expected to have learned of the breach or violation was filed with the Secretary. 29 U.S.C. ss 1113(a). Were fraud or concealment of the breach is involved, an action must be brought within six years of the date of discovery of the breach or violation. Id.

The defendant offers evidence that all three plaintiffs had actual knowledge of the violation or breach more than three years before the filing of their federal action. Specifically, the defendant points to the depositions of all three plaintiffs in which each acknowledges meeting with at least one other in late 1981 or early 1982 to review documents which allegedly prove their claim. The defendant also points to plaintiffs' Michigan complaint, filed

August 30, 1983, almost three years before the filing of the federal complaint, as indicative of plaintiffs' actual knowledge.

Plaintiffs, on the other hand, contend, in affidavits ordered in opposition to defendant's motion for summary judgment, that they had no actual knowledge until September, 1987, when their attorney gave his opinion on the strength of their claim. Plaintiffs claim these affidavits show that there is a genuine issue of material fact which precluded summary judgment by the District Court.

The District Court, relying on plaintiffs' deposition testimony, ruled that plaintiffs had actual knowledge of the breach no later than early 1982 and that their 1986 federal action was filed beyond the limitations period. The court disregarded the plaintiffs' affidavits as self-serving attempts to create a sham issue of fact.

We agree with the District Court-there was no genuine issue of fact as to plaintiffs' actual knowledge of the breach. Indeed, as the Second Circuit stated in Perma Research &

Development Co. v The Singer Co., 410 F.2d 572, 578 (2d Cir. 1969), and this Court adopted in Biechele v. Cedar Point, Inc., 747 F.2d 209, 215 (6th Cir. 1984):

> "If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact."

III.

Our inquiry, however, does not stop there. Plaintiffs assert that even if their action was filed outside the applicable statute of limitations, the statute of limitations was tolled by the filing of the state court action. As authority for this proposition, plaintiffs cite Burnett v. New York Central Railroad Co., 380 U.S. 424 (1964). In Burnett the plaintiff filed his FELA action in federal court after his state FELA action was dismissed for improper

venue. The state action was filed within the three year time bar, the federal action was not. The Court held that where a timely FELA action is begun in a state court having jurisdiction, the defendant is served with process and the case is dismissed for improper venue, the FELA statute of limitations is tolled during the pendency of the state suit and until the state court dismissal becomes final. Id. Such tolling, the Court reasoned, was fair to both plaintiff and defendant, carried out the policies of FELA and best served the policies of uniformity and certainty in applying the FELA limitations provision. Id. at 436.

The District Court rejected this argument, however. Construing plaintiffs' claim as one "for breach of fiduciary duty" and reasoning that pursuant to 29 U.S.C. s 1132(e)(1),[1] fed-

[1] 29 U.S.C. s 1132(e)(1) provides in pertinent part:

eral courts have exclusive jurisdiction over ERISA breach of fiduciary duty actions, the District Court held that the statute of limitations was not tolled because the state action was filed in a court which "clearly lacked jurisdiction." As principal authority for this proposition, the District Court cites the following two cases: **Silverberg v Thompson McKinnon Securities, Inc.**, 787 F.2d 1079, 1082 (6th Cir. 1986)(Securities Exchange Act statute of limitations not tolled by filing of action in state court because federal jurisdiction exclusive); **Fox v. Eaton Corp.**, 615 F.2d 716, 718-720 (6th Cir. 1980), cert. denied, 450 U.S. 935 (1981) (90 day Title VII limitations period tolled by filing action in state court which plaintiff reasonably believes has subject matter jurisdiction).

In Silverberg, the plaintiffs filed a complaint in Ohio state court alleging, inter alia, violations of the Securities Exchange Act, a claim over which federal courts have exclusive

jurisdiction. This complaint was dismissed for lack of jurisdiction. While their appeal was pending, but after the statute of limitations on the Securities Exchange Act violation claim, plaintiffs filed a nearly identical complaint in federal court. This Court refused lo equitably toll the statute of limitations holding that the commencement of an action in a clearly inappropriate forum does not equitably toll the statute of limitations" 787 F.2d at 1082.

In Fox, an employment discrimination case, plaintiff first brought an action in Ohio state court claiming breach of the collective bargaining agreement. 615 F.2d at 717. She later, pursuant to a stipulation by all parties of jurisdiction,

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Except for actions under subsection (a)(1)(B) ..., the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter... State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

No.88-1042 Farrell v Automobile Club of Michigan amended her complaint to include a Title Vll employment discrimination claim. Id. On appeal the Ohio Supreme Court held, sua sponte, that state courts lack jurisdiction over Title VII actions and dismissed the Title VII claim for lack of jurisdiction. Id. Plaintiff, therefore, refiled her Title VII claim in District Court. Id

The District Court dismissed the action reasoning that plaintiff had not commenced her suit within 90 days of the receipt of a right to sue letter and that the 90 day filing requirement was jurisdictional and could not he tolled. Id. at 718. This Court, recognizing that generally, the filing of an action in a court that clearly lacks jurisdiction will not toll the statute of limitations, held that tolling was appropriate. Id. at 718 and 720. This Court reasoned that in this case, lack of jurisdiction was far from clear and that tolling was consistent with the Supreme Court's rationale in Burnett supra.

The critical issue, therefore, becomes whether the Michigan state court clearly lacked

jurisdiction over plaintiffs' ERISA claim. If it did, the District Court's argument is persuasive. If it did not, however, the doctrine of equitable tolling may apply.

The ERISA jurisdiction clause, 29 U.S.C. ss 1132(e)(1),[2] provides in pertinent part that jurisdiction of actions brought under ss 1132(a)(1)(B)[3] is concurrent between state and federal courts. All other actions must be brought exclusively in federal courts. Id. The Michigan court had jurisdiction over

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[2] See note 1, supra.

[3] 29 U.S.C. s 1132(a)(1)(B) provides in pertinent part:

A civil action may be brought--by a participant or beneficiary ...to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan....

plaintiffs' ERISA complaint, therefore, only if it was brought under s 1132(a)(1)(B).

Plaintiffs' Michigan complaint alleges in pertinent part as follows:

> (17) The conduct and representations undertaken as described herein and foregoing constitute fraudulent conduct by Defendant and serious breaches of Defendant's fiduciary duty to each Plaintiff as pertains to the subject of retirement and pensions.
>
> (18) The retirement and pension benefit information given by Defendant to each plaintiff was false, and the benefits made available to and/or paid to each Plaintiff was insufficient... and the true retirement benefits... were substantially greater than those claimed by defendant. ...
>
> (21) As a direct and proximate result of the... misconduct of the Defendant,... each Plaintiff has suffered... loss of employment benefits....
>
> WHEREFORE, Plaintiffs pray that full compen-

sation... be made, including the value of all benefits, [and] future pay and benefits....

Plaintiffs' claim can be construed as arising under at least two different ERISA provisions, although, as we shall see, ss 1132(a)(1)(B) seems the most appropriate. The language in paragraph 17 of plaintiffs' complaint, claiming "serious breaches of defendant's fiduciary duty" could be construed as an exclusively federal claim arising under 29 U.S.C. s 1109[4], outlining liability for breach of fiduciary duty. But

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[4] 29 USC s 1109 provides in pertinent part:
Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by his subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary....

there is a serious flaw in this reasoning, Section 1109 authorizes relief only to the plan itself, not to individual beneficiaries. See Massachusetts Mutual Life Insurance Co. v Russell, 473 U.S. 134, 140 (1985) (ss 1109 does not provide a cause of action for extra-contractual damages to a beneficiary caused by improper or untimely processing of benefit claims because ss 1109 relief inures to the benefit only of the plan itself not an individual beneficiary). Plaintiffs' request for relief, however, is for themselves as individual beneficiaries, not for the plan as a whole.

Alternatively, plaintiffs' complaint could be construed as a ss 1132(a)(1)(B)[5] action to recover accrued benefits, a claim for which federal jurisdiction is concurrent with state court jurisdiction. This construction is supported by plaintiffs' prayer for individual relief in its state complaint and by plaintiffs' federal complaint which expressly requests ss 1132(a)(1)(B) relief. The District Court's

refusal to toll the statute of limitations on the ground that the state court "clearly lacked jurisdiction" is, therefore, erroneous.

Tolling is justified in this case for several reasons. First as we have shown, the state court appears to have had jurisdiction over the claims of the individual plaintiffs under ss 1132(a)(1)(B) of ERISA.

Second, as Burnett, supra., teaches, the primary purpose of statutes of limitations is to promote fairness to defendants by preventing prosecution of stale claims and the loss of relevant evidence and by encouraging diligence by plaintiffs. 380 U.S. at 428. See also Morgan v. Washington Manufacturing Co., 660 F.2d 710, 712 (6th Cir. 1981)(in the absence of prejudice to the defendant or a showing of bad faith or lack of diligence by a claimant, equitable considerations should toll the 180 day period for filing a complaint under Title VII when the claimant makes a timely filing with a federal agency).

[5] See note 3, supra.

Where circumstances arise in which the plaintiff has been diligent and the defendant has been given adequate notice of the claim, "courts must be flexible to assure that the true purpose of the limitation is served." Joseph v. Syrian Arab Airlines, 88 F.R.D. 530, 532 (S.D.N.Y. 1980).

It cannot be argued that it is not fair to require defendant to answer and defend in the case at bar. From the outset of the state court proceedings, defendant had notice of and knowledge of the nature of plaintiffs' claim and that the allegations contained therein gave rise to a cause of action under ERISA. Indeed, it was the defendant who moved for dismissal of the state claim on the ground that it was preempted by ERISA. Nor can it be argued that defendant was presented with a stale claim or deprived of an opportunity to preserve relevant evidence or that plaintiffs did not diligently pursue their claim. Finally, Burnett instructs us to deny tolling when it would frustrate the purpose of the

statutory scheme. In this case, tolling would serve rather than frustrate the broad remedial purpose of ERISA-protection of participants in private pension plans.

IV.

Finally, plaintiffs contend that the District Court abused its discretion in refusing lo assert pendent jurisdiction over plaintiffs state law claims. Plaintiffs' argument is without merit. The District Court's decision was based not only on its view that there was no federal question presented but also on considerations of judicial economy. As the District Court pointed out, plaintiffs should not be allowed to pursue their state claims in two forums. Moreover, a Michigan forum is better suited to determine questions of Michigan law.

Based on the foregoing, we affirm the District Court's refusal to assert pendent jurisdiction over plaintiffs' state age discrimination claims, reverse the District Court's holding that plaintiffs' ERISA claim is time barred, and remand the cause for further

proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

KEITH FARRELL, WILLIAM MURRAY
and RICHARD RICHARDSON.

Plaintiffs,

-vs-

No-86-CV-73515-DT

AUTOMOBILE CLUB OF MICHIGAN Hon. George E. Woods

Defendant. Motion

_____/

Proceedings had in the above-entitled cause before the HONORABLE GEORGE E. WOODS, United States District Court Judge, at 277 United States Courthouse, Detroit, Michigan, on Thursday, July 13, 1989.

APPEARANCES:

For the Plaintiffs: GARY A. COLBERT, ESQ.
15565 Northland Drive
Suite 506 West
Southfield, Michigan 48075

For the Defendant: WILLIAM G. JAMIESON, ESQ.
Denenberg, Tuffley

Detroit, Michigan

Thursday, July 13, 1989

THE COURT: How about Farrell v. Automobile Club of Michigan? This is your motion for summary judgment. I have read it all. I don't mean to abort anything you have to say, but I just feel it is necessary for me to tell you it is not necessary for you to cite cases. chapter and verse from your briefs and memorandum because I have read them.

MR. JAMIESON: You have read them.

There were originally breach of contract and Elliot-Larsen and ERISA claims. The breach of contract and Elliot-Larsen claims were dismissed by this Court based on pendent jurisdiction arguments.

When the court dismissed this case on the statute of limitation grounds, when it went to the Court of Appeals--

THE COURT: I was wrong on that.

MR. JAMIESON: I don't believe you were.

When it went to the Court of Appeals, they sustained the pendent jurisdiction, breach of

contract and Elliot-Larsen, and what remains here is the ERISA claim.

THE COURT: You got it.

MR. JAMIESON: These plaintiffs received retirement benefits in a lump sum. It was broken down into two types: accrued benefits and special early or supplemental benefits that were provided as part of a special early retirement arrangement.

I believe we have established that there is no question that the accrued benefits that they received were computed accurately. I don't think there is any argument about that.

the only argument that exists is whether or not the Automobile Club properly used a ten percent discount factor in computing what the special early supplemental benefits would mean to these employees on a lump sum, up front basis.

The plaintiffs argued that we can't use a ten percent factor because we had set forth a six percent factor in determining the accrued benefits, and, therefore, we can only use that six percent factor.

Let me stop back one other step.

I think that we have established that there was nothing wrong with using the ten percent factor in terms of the interest rates and what was going on economically at the time. The ten percent factor was extremely appropriate, as was the UP '84 formula with regards to mortality and so on.

The plaintiffs suggest that a revenue ruling, 79-90, which indicated that the Plan must specifically identify the actuarial equivalence that are going to be used was violated. They recognized that 879-90 didn't go into effect until about 3 years after, these people retired. However, they argue that the spirit of that revenue ruling was violated.

We suggest that the Dooley case indicates that it was not. That requirements under that revenue ruling, that actuarial equivalence be specifically defined, wasn't something they required until 1983. And we suggest that since it is the essence of their complaint, and we believe Dooley gives us some direction in terms

of how to deal with that, that the Automobile Club did not violate the spirit of 79-90; that they didn't have to comply with it until December of 1983.

The other aspect that I want to deal with just briefly is the kind of claim that exists here under ERISA. The Court of Appeals discussed that in terms of trying to decide whether the case was barred by the statute of limitations and the Court of Appeals said, "You have got either an 1109 claim or an 1132 claim.. If you have got a 1132 claim you have concurrent jurisdiction with State Court."

And the fact that they filed a State Court complaint sometime before this one gave them some equitable basis to extend the statute of limitations or toil it. They recognized the 1109 claim authorized relief to the Plan only in a way, and that's a section of ERISA that the plaintiffs couldn't avail themselves of, because they were suing under 1132 in an action to recover accrued benefits.

The point in mentioning that is simply that

this is what this case is about, an action for benefits that these people claim that they didn't get, and I think we have satisfied the Court that their benefits were properly computed and that there was no violation of 789-90 to the extent that 79-80 wasn't a governing or controlling factor in the Auto Club's determination of these retirement benefits.

Therefore, we ask that the Court grant our motion for summary judgment.

THE COURT: All right. Mr. Colbert.

MR. COLBERT: Good afternoon. Gary A. Colbert representing the plaintiffs in this matter. Let me get my notes.

Recently the defendant, I think last week, sent the Court a copy of the twenty-first and twenty-second amendment of the Plan that's a question here. At Page 5 of that Plan, if the Court will look, there's a definition of what is an actuarial equivalent. Section 14 of Article 2, I believe. And it states:

"An actuarial equivalent means a benefit of equivalent value

computed on the basis of such actuarial tables and interest rates as last adopted--"

THE COURT: "As were last adopted."

MR.> COLBERT: ". . . as were last adopted for this purpose by the employers and some other individuals named."

That last adopted actuarial equivalent is the discount rate that we are talking about. And what was not sent to the Court was the twenty-fourth amendment to the Plan.

The twenty-fourth amendment to the Plan being an amendment adopted on July 1, 1982, which changed the actuarial equivalent in 1982 to the one that was used in 1980. And that, I submit to the Court, is against the very language of the Plan itself and constitutes, in and of itself, deprivation of benefits to my clients by the amount of reduction--the premature reduction of that actuarial equivalent.

I would also submit to the Court that if they don't like the revenue ruling trying to be

applied to them, the revenue ruling that was enacted in 1979, giving them notice in 1980 of what they ought to do, if they don't like that being applied to them because its not effect until after the fact, then I submit to the Court they can't take advantage of something they did after the fact that applies retroactively to these individuals.

I would also submit to the Court that it isn't merely this reduction in the interest rates upon which we're relying as to the deprivation of benefits. We're relying on misrepresentations made to Mr. Richardson, lack of information and all other matters that are cited in the brief that I submitted to the Court.

It just so happens that indeed the Court of Appeals did hold that this was an action for deprivation of benefits, rather than an action of breach of fiduciary duty. It's true. But I would submit to the Court that what happened here was a withholding of benefits that occurred because of the breach of contract between my clients--this contract right here in part--and

the duties of the fiduciary, that the fiduciary had towards my clie ts. And the fiduciary's duty for breach of--if my clients had elected to sue for breach of fiduciary duty, they would have had to sue on behalf of the Plan. It acts like options, those two sections of the statute, election of remedy. And the remedy they elected was not on behalf of the Plan itself, because they were no longer members of it, but for the benefits that they were deprived of because of the fiduciary's actions breached the contract towards them; and the result of that was the withholding of benefits to which they were actually entitled.

It's true, and I will agree with my brother counsel, we are not talking about how the accrued benefits were computed. We're talking about how these supplemental benefits were computed, and then the fact that two years--well, not quite two years--down the line there's a change in interest factors in the Plan, but that actual change in this interest discount factor was used with my clients, when they were entitled to a more

favorable discount rate.

There has been expert testimony on that, and the expert has computed the difference.

Given what the Court has said before, I tried to restrict my comments to what counsel raised on argument and on his responsive brief.

REPORTER'S CERTIFICATE

I, BARBARA C. CHATMAN, Official Court Reporter for the United States District Court of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing proceedings were had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

BARBARA C. CHATMAN, CSR-0077

Dated: 4/6/90

Detroit, Michigan

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

KEITH FARRELL, WILLIAM MURRAY
and RICHARD RICHARDSON.

Plaintiffs,

-vs-

No-86-CV-7351S-DT

AUTOMOBILE CLUB OF MICHIGAN Hon. George E. Woods

Defendant. Motion

_____/

Proceedings had in the above-entitled cause before the HONORABLE GEORGE E. WOODS, United States District Court Judge, at 277 United States Courthouse, Detroit, Michigan, on Thursday, July 13, 1989.

APPEARANCES:

For the Plaintiffs: GARY A. COLBERT, ESQ.
15565 Northland Drive
Suite 506 West
Southfield, Michigan 48075

For the Defendant: WILLIAM G. JAMIESON, ESQ.
Denenberg, Tuffley

Detroit, Michigan

Thursday, July 13, 1989

THE COURT: Well, each of the plaintiffs in this case, as we know, had been long term managers employed by the Triple A. All of them accepted a special early retirement offer which Triple A offered between July 1, and December 31, 1980, that made available as I remember, to employees who were 55 years of age or older.

Plaintiffs have alleged that the defendant misrepresented that this program was financially advantageous in comparison with the regular retirement plan. Plaintiffs originally sought recovery for the defendant's alleged violation of ERISA in Count I, their Count II, which was breach of employment contract, and then their third count was age discrimination under Elliot-Larsen.

This was what, December 31, 1987, this Court granted summary judgment on all claims, holding that Count I was precluded by the statute of limitation and refusing to assert pendent jurisdiction over Counts II and III which were

all subject of a State Court Action.

The Sixth Circuit affirmed this Court's dismissal of Counts II and III, but reversed as to Count I, holding, as they did, that plaintiffs' Count I claim was an action under 29 U.S.C.1132(a)(1)(B) to recover accrued benefits, a claim for which federal jurisdiction is concurrent with state court jurisdiction. Accordingly, then the Court determined that plaintiffs' filing of a state court suit tolled the statute of limitations and rendered this cause of action timely. That's by way of background.

Well, because Count I was dismissed on procedural grounds, this Court never reached the substantive merits of plaintiffs' Count I claim. So, now then the defendant has renewed its motion for summary judgment.

The provisions of the early retirement plan were succinctly stated as follows:

Participants were paid their regular accrued benefits and were also given SERO supplements which eliminated the usual reduction

in benefit amounts that would occur when an employee took regular or early retirement.

Participants, as I recall, could elect to be paid a lump sum benefit or a monthly benefit, and each of these plaintiffs elected the lump sum payment, and lump sum amounts were calculated to be actuarially equivalent to the monthly benefits.

The regular accrued benefits were calculated and converted into lump sum amounts by using the table prescribed by the Plan, as would be used for normal retirements.

I gather that plaintiffs have not, and do not dispute the manner in which the regular benefits were calculated. Their dispute, as counselor has stated, is with the manner in which their supplemental benefits were computed.

That is they challenge the use of a 10 percent interest rate plus "UP-84" assumption in determining the current value lump sum equivalents of the supplemental benefits. That is how I understand it.

Ordinarily, the Plan called for six percent

interest rate assumption to discount lump sum benefits.

In designing the SERO benefits, however, the defendant's actuary, the Wyatt Company, as I recall, advised that while the six percent interest assumption was consistent with defendant's present practices, it would dramatically increase the amount of cash that the lump sum retiree would receive over that which a monthly benefit retiree would receive. Accordingly, the defendant claims in order to avoid the inequity of providing greater benefits to the lump sum retirees than to the monthly benefit retirees, the defendant then used a ten percent discount factor in computing supplemental benefits. In doing so, the defendant also reduced its plan funding cost.

Apparently the defendant did not disclose to or inform the plaintiffs that the ten percent factor would be used.

Well, in making an analysis of this, and directing my attention first to the breach of fiduciary duty as claimed, preliminarily it would

strike the Court that we must address plaintiffs' claims of breach of fiduciary duty.

3s' allege that the facts, as I have already given them already, and the claims in the defendant's summary judgment motion ignore the claims which plaintiffs' have made that defendant breached its fiduciary duty by giving false and/or misleading information, refusing to give information, failing to properly disclose or inform as to plaintiffs' claims.

In the Sixth Circuit opinion in this case, however, with which we are certainly all familiar, the Court ruled that the instant suit cannot be deemed to be exclusively a federal claim arising under 29 U.S.C. 1109 outlining liability for breach of fiduciary duty. But, rather the Sixth Circuit concluded in their opinion that the claim should be read as claim under 29 U.S.C. 132(a)(1)(B) for accrued benefits, a claim for which there is concurrent state/federal jurisdiction and for which the statute of limitations would be tolled while the case was pending.

Therefore, it seems to this Court that plaintiffs cannot now reassert a claim for breach of fiduciary duty and such claim will not preclude summary judgment. The only issue here is the sufficiency of the benefits paid to the plaintiffs under the terms of the plan.

So, let's turn to the sufficiency of the benefits.

As to the propriety of defendant's actions in changing actuarial assumptions and interest rates, this Court is going to be bound and guided by the analysis in Dooley -v- American Airlines, 797 F. 2nd 1447 7th Cir., 1986

In that case, counsel, the plaintiffs were retired pilots, as you may know, who sued their pension plan's fiduciaries for changing the fixed actuarial assumption of eight and a half percent to a floating rate based on Moody's Triple A Corporate Bond Rate. The plaintiffs chose to receive their retirement benefit in the form of a lump sum benefit, and during the period in question, the highest actuarially-equivalent interest rate would have been approximately

Eleven percent. The floating rate, however, interestingly soared as high as almost Sixteen and a half percent, resulting in substantially reduced lump sum distribution to the plaintiffs. The Court in Dooley engaged in essentially a three step analysis.

First, the Court determined that the language of the Plan in question allowed the Administrator to change the Plain's interest rate.

Second, of the three steps, the Court addressed the question of whether such employer discretion violated public policy. And then, the third step in the analysis--Oh, by the way that is in Dooley, as in this case, of course the plaintiffs argue that such discretion should be prohibited by Treasury Regulation and Revenue Rule 79-90.

As you indicated, the Treasury Regulation requires, in order for the Plan to qualify under IRC 401, its benefits must be "definitely determinable," as they say.

79-90, which follows up on Revenue Rule 74-

385, provides that "definitely determinable" means that any actuarial assumptions used must be specified within the plan in a manner which precludes employer discretion.

The Dooley Court then made mention and note, however, that 79-90 was a novel decision in its on right, which the IRS decided would be phased in and then would not apply to already existing Plans until on or after December 31, 1983.

The Plan of issue in the Dooley case, of course, was in existence on the date of Revenue Rule 79-900, and the plaintiffs retired prior to 1983. Therefore, the Dooley Court refused to apply Revenue Rule 79-90 restrictions on discretion to the circumstances of that particular case.

Similarly, in this case, our case, the Plan was in existence on the date of Revenue Rule 79-90, and the defendant was thus not required to be in compliance until 1983. Following Dooley we will not apply Revenue Rule 79-90 retroactively to the plaintiffs 1980 retirement, nor are we

persuaded by plaintiffs' assertion that defendant's action should be declared improper because it violated the so-called spirit of Revenue Rule 79-90.

Now then, to get to the third step in the Dooley analysis, the final step was to decide whether the change in interest rate in fact resulted in actuarial equivalence, or whether the employer was simply engaged in a kind of self-dealing, if you please.

In Dooley the Court found that there was not actuarial equivalence. In this case, the reverse is true. The affidavit of the defendant's actuary states that the use of UP-84 to ten percent interest rate figure were in accordance with accepted actuarial standards and plaintiffs certainly have not actually contested the defendant's assertions that the use of six percent discount factor would have resulted in a sort of windfall to lump sum retirees.

The reason for this, of course, is that in 1980, the year the plaintiffs retired, interest rates were substantially higher than six percent,

or even ten percent, thus allowing a lump sum retiree to take his money and buy an annuity with a monthly dividend considerably higher than the monthly pension benefit received by a monthly benefit retiree.

In short, this Court finds that ten percent discount factor did in fact achieve actuarial equivalence more nearly than the six percent rate would have done.

Moreover, the fact that the ten percent discount factor resulted in defendant contributing less to the pension fund certainly does not render use of the ten percent factor impermissable.

If you are familiar with the Holliday -v- Xerox Corp. case, 732 F. 2d 548, out of the Sixth Circuit in 1984, the Court held as follows, and I quote from that case:

> "The language of ERISA stating that the assets of a plan shall never inure to the benefit of any employer' cannot be read as a prohibition against any decisions of an employer

> with respect to a pension plan which have the obvious primary purpose in effect of benefiting the employees. and in addition, the incidental side effect of being prudent from the employer's economic perspective .... Congress did not intend the Act to penalize employers for exercising their discretion to make rational economic decisions which are both in the best interest of the preservation of the fund and which are also not adverse to the employer's interest"

So therefore, this Court finds that so long as the Plan gave defendant's discretion to change the actuarial assumptions, the defendant's action in doing so cannot be deemed to be impermissible as self-dealing or as a violation of the spirit of Revenue Rule 79-90.

So then we turn to the language of the Plan, which our attention earlier had been directed by counsel. There is no sense in my

repeating Article V, Section 5(b). That has been read into the record by counsel. But Article II, Section 14--Article V, 5(b) bears mentioning Option F.

> "Such other actuarially equivalent option or options shall be made available by the Committee on a uniform and non-discriminatory basis."

The defendant has offered the affidavit of its actuary, stating albeit in a conclusionary way, that use of factors based on UP-84 and ten percent interest was permitted by Article II, Section 14 of the Plan.

The plaintiffs, on the otherhand, counter that with the deposition testimony of their expert, a Mr. Craig Arnold, to the effect that the change was made without Plan authority or any other authorization, and that the Plan was only amended to allow for the new actuarial assumptions two years after plaintiffs' retirement.

Plaintiffs also make an unexplained reference to a statutorily-required filing which they claim defendant failed to make or accomplish in this matter.

Well, this dispute, gentlemen, seem to me to create a genuine issue of material fact. The plain language quoted by the defendant is not completely clear on its face in its approval of actuarial tables and interest rates "last adopted" by the Employers and their actuaries, in that there is no definition of what constitutes adoption. It is not clear to this Court whether the employer's Board must adopt new tables, nor is it clear whether the Board did so in this case.

Alternatively, this crosses the Court's mind, must the plan itself be amended before a change be made, is informal adoption adequate, what procedures or actions were in fact taken in this particular instance?

So, then,, out of this rather hazy muddle here, until this Court has been more thoroughly briefed, frankly on what procedures are required

either by the Plan or by law, as well as more thoroughly briefed as to what procedures were actually taken prior to defendant offering this SERO, this Court simply cannot rule as to whether or not the Plan authorized the discretionary actions taken by defendant in this case.

So, the Court's ruling is, that the motion for summary judgment is granted in part as to the issue surrounding Revenue Rule 79-90, and the breach of fiduciary duty and self-dealing claims. the Court's ruling is that is denied in part without prejudice as to whether the defendant's actions in this case were authorized by the Plan.

I think I have made myself clear. Defendant's counsel will draw the appropriate order and submit it to Mrs. Henson at or before 1:00 o'clock in Monday. So you know what you have to do, I no doubt will have amended motions in due time, post haste, I might add, if you can. Let's do it as quickly as possible. Let's either fish or cut bait on this one counsel, shall we.

Court is in recess.

REPORTER'S CERTIFICATE

I, BARBARA C. CHATMAN, Official Court Reporter for the United States District Court of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing proceedings were had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

BARBARA C. CHATMAN, CSR-0077

Dated: 8/7/89

Detroit, Michigan

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

KEITH FARRELL, WILLIAM MURRAY
and RICHARD RICHARDSON.

Plaintiffs,

-vs-

No-86-CV-73515-DT

AUTOMOBILE CLUB OF MICHIGAN Hon. George E. Woods

Defendant. Motion

_____/

Proceedings had in the above-entitled cause before the HONORABLE GEORGE E. WOODS, United States District Court Judge, at 277 United States Courthouse, Detroit, Michigan, on Thursday, November 30, 1989.

APPEARANCES:

For the Plaintiffs: GARY A. COLBERT, ESQ.
15565 Northland Drive
Suite 506 West
Southfield, Michigan 48075

For the Defendant: WILLIAM G. JAMIESON, ESQ.
Denenberg, Tuffley

Detroit, Michigan

Thursday, November 30, 1989

THE COURT: Let's get up here and get this show on the road.

MR. JAMIESON: Shall I proceed, your Honor?

THE COURT: Yes.

MR. JAMIESON: William Jamieson on behalf of the defendant Automobile Club.

This is our motion for summary judgment.

As the Court knows, this is a lawsuit that was started with three counts. First count dealt with ERISA violations; second count, breach of contract count; and the third count, Elliot-Larsen count.

We filed an original motion for summary judgment that set forth a number of substantive issues, as well as statute of limitation issue. The Court dealt with the statute of limitations issue and granted our motion for summary judgment. The case went to the Court of Appeals. They reversed in part, and they sustained the Court's dismissal on the Elliot-Larsen case based on the fact that they belonged in the state

Court; and there was in fact, at that time a case pending in the State Court, as well as a breach of contract count.

So what we are faced with is an ERISA count, which included allegations of breach of fiduciary duty, self-dealing violations of public policy, violation of Revenue Rule 79-90. Those four ERISA concerns or allegations by the plaintiff were dealt with by the Court in its ruling in June, 1989 and were dismissed.

At that time, the Court was concerned about the fact that it did not have sufficient information to allow it to determine that the Plan authorized the adoption of special early retirement options, which we have referred to as SERO, or that there was authorization allowing adoption of the ten percent discount rate for a lump sum payment of the supplemental monthly benefits.

As the Court will recall, this ten percent issue dealt with whether or not the Auto Club could adopt a discount rate for supplemental benefits that it was providing to these early

retirees, which supplemental benefits were over and above the accrued benefits. The accrued benefits had a predetermined interest rate that was less than ten percent.

The Auto Club decided at the time they offered the SERO, with advice of their actuaries, that a ten percent discount rate, based on the interest rate at the time, would be actuarially equivalent and fair for all people involved in this plan, and those that were accepting a lump sum payment and those that had decided to accept monthly payments.

The Court ruled previously that the fact that the Automobile Club did not write into their Plan and expressly set forth the use of the ten percent factor, did not create a cause of action; that the Auto Club was not required to do that. And the Court made that decision based on its interpretation of Dooley v. American Airlines, and Dooley's interpretation of allegations of violation of Revenue Rule 79-90, which said that a Plan, after a certain date, had to incorporate percentages, but did not have to prior to that

date.

And Dooley affirmed that holding, that in fact even the spirit of the revenue ruling did not force an employer, such as the Auto Club, to utilize or express an interest rate.

So, the Court has already ruled that if the change was authorized, it did not violate public policy--that public policy is pronounced by ERISA --nor was it prohibited by Revenue Rule 79-90.

The additional materials that we have submitted to the Court set forth the background of consideration and adoption of the SERO. And affidavit from Fred Schrock, who was manager of Benefits and Compensation for the Auto Club, indicates that he was assigned by the president of the club the task of developing a special early retirement option.

And, as I indicated, in about September, 1979, he consulted with the Automobile Club's actuaries, the Wyatt Company. We have an affidavit from Gary Swindlehurst of the Wyatt Company with regard to their consultation. There are documents attached that indicate that the

Wyatt Company felt that ten percent--that the use of the ten percent factor was a more realistic basis than the lesser percentage that the Auto Club was going to use with regards to the accrued benefits.

Keep in mind that the Auto Club was not changing that percentage. They were going to utilize that percentage for accrued benefits. They were only going to utilize the higher, more realistic percentage, with supplemental benefits that they were adding to this SERO.

In June, 1980, the Auto Club''s board considered and approved the SERO, and that's verified with affidavits from the --

THE COURT: Counsel I know these facts as well as you do.

MR. JAMIESON: It is too voluminous.

Does the Court have specific questions?

THE COURT: The only question remaining to be litigated, the question of what the Plan required and the Plan's requirements were adhered to, whether you adhered to those. So, address that.

MR. JAMIESON: I think you have the affidavit of Ward Randall, who is an attorney that was employed by the Automobile Club to deal with drafting of documents.

Mr. Randall has indicated that he drafted the twenty-first amendment and restatement of their benefits Plan in 1979.

He drafted the twenty-second amendment to the Plan, which was the amendment that reflected the special early retirement option, and he affirmed in his affidavit that the Plan empowered the Board to modify the Plan, that the Plan authorized the Auto Club Pension Advisory Committee to make the SERO available; that the Auto Club was not bound to use any particular discount rate, as long as it provided actuarial equivalence or equivalent value. That is the value of the lump sum that an employee might choose to take was the same as the value of those payments spread out over a period, if the employee decided on that option.

And he further affirmed that the Auto Club followed the Plan's provisions in adopting this

SERO.

I think with Mr. Randall's affidavit, with the certificate from Ms. Barnhart from the Automobile Club with respect to the adoption of the SERO, and the affidavit of Mr. Schrock, their benefits manager, who indicated he was the one who presented the Plan to the Board, that he was the one that consulted with the Wyatt Company with regards to the ten percent, I am not sure whether we have left a hole with regards to satisfying the Court that in fact the Plan allowed an amendment to provide a special early retirement option; and that the Auto Club considered it and approved it and enacted it through its Pension and Benefits Group.

Another issue that Mr. Colbert, on behalf of the plaintiffs, raises in over half of the pages in his brief deals with the righteousness of the ten percent, the use of the ten percent factor, and it seems clear to me that the Court has indicated that it was righteous for the Auto Club to use that ten percent factor.

I may be missing his point with regard to

all of the time that he spent in his brief dealing with the complaint that his expert had with the use of the ten percent factor, when the Court, I believe, has already determined that the Auto Club exercised proper judgment in providing that ten percent factor, which was actuarially equivalent and fair for the employees who were taking a lump sum, or those employees that chose to take their payments over a period of time.

He mentions that twenty-second amendment. Mr. Colbert mentions that twenty-second amendment does not provide any expert means of actuarial equivalence. I think that is the ten percent. I think that an interpretation of the revenue ruling and Dooley, and the Court's prior ruling, indicates that it wasn't necessary to mention that in the SERO itself.

Unless the Court has some questions, thank you.

THE COURT: Let's hear what Mr. Colbert has to say.

If you would be comfortable sitting.

MR. COLBERT: Thank you, your Honor.

I think the last time we were here, in the summer of this year, the Court said that it would grant summary judgment, except for the part that Mr. Jamieson enumerated to you, based upon--and he said that the evidence seemed to show that, or lack of showing that there was a compliance either to the terms of the Plan or to some statutory requirement to which reference had been made.

And my brief attempted, and I think did address both of those concerns of the Court, and I think I showed that in my brief there was a lack of compliance on statutory requirements as to informing these individuals of changing, as required by ERISA. And this is a very, very important flaw in that by not filing the required documents and information with the Secretary of Labor, and in the other areas that Defendants were required to file, they deprived the Plaintiffs of a potential basis of fact or source of fact for their information, thereby depriving the Plaintiffs of making a fully informed decision; and indeed that is the purpose of

ERISA, that is the purpose of these filing requirement.

The statute requires filing of material modifications of the Plan, and I would submit to the Court that a methodology of ascertaining a benefit and change in that methodology is a material alteration of the Plan.

It is true that there is some information that is given. I think that the past briefs of counsel, both during the first summary judgment materials before the Court of Appeals and the last time that we were here to beat the issue to death, at least to the fact that Plaintiff attempted to gain additional information because of concerns of theirs were not adequately addressed by the efforts taken by the defendant to tell them what their benefits were.

For example, in the case of Mr. Richardson, he wanted to know what his benefits would be if he continued working to normal retirement age, as his current pay that was computed at, and he wanted to make an assumption as to computing it with his normal or average salary during the

course of his 25 years.

Of course, this was not answered.

If M. Richardson had been aware of the change in the computation method of this Plan, and that it would severely affect benefits and the amount of money he was going to receive, this law suit wouldn't be here, because he wouldn't have retired, nor would the other two gentlemen.

Given this lack of information, on, of course, for lack of giving this information, which in dispute, I have not seen disputed in all the papers, filings have occurred, this lack of giving information is one of the kinds of behaviors that ERISA is aimed at preventing, and the filing of this information is the crux of the Plan.

The defendant cited Firestone tire and Rubber Company v. Bruch and they quoted Page 97 of the Lawyers Edition 2d:

> "The Supreme Court stated, we do not think Congress' purpose in enacting ERISA disclosure provisions--ensuring that the individual participant knows

exactly where he stands with respect to the Plan, and knowing where one exactly stands with the respect to the Plan, includes being aware of anything that would affect the kind of benefits and the amount of that benefit."

Certainly, these individuals were informed of the category of the benefits, and defendant's brief tries to persuade us by saying, well, we have informed them of the kinds of benefits. That categorization of benefits has nothing to do with informing them of how the benefit is arrived at and any differences that might occur in monetary terms between the selected interest rate used, the one that had been used in the past, nor does it provide them with information that is requested.

That is, what happens if we don't accept it, what happens to this retirement benefit in the future should we continue to work in our customary, ordinary historical fashion? This goes to the first part, I think, of the Court's

concerns. Did that comply with statutory requirement? No, they did not. They admit they didn't. did it affect Plaintiffs? It certainly did, because it deprived them of their knowledge to know. The knowledge of the filing itself is remedied within the statute by damages. I think its $100.00 a day until the filling is made. The filing was not made until much later historically.

The second concern of the Court that the Court raised when we were here in the summer, was this authorized by the Plan. And the second half of my brief went to trying to show, and I thought I did it, trying to show that indeed the Plan itaself, the language of the Plan and provisions of the Plan as it existed at the time that this offered--SERO offer was made, were not complied with. And I think summary judgment should not be granted, because the statute was not complied with, and the Plan was not complied with.

And, indeed, i think there are questions of fact and material questions of fact that remain.

The Auto Club states, and I think it's a

Page--it must be Page 3 of their brief, I've got the bottom chopped off, that Defendant's initial announcement of the SERO clearly provided all the employees who accepted the SERO would receive present benefits presently specified in the Retirement Plan, plus additional benefits.

I think it's a question of fact whether, especially the second layer of benefits which were additional benefits which comprise the SERO, and that in a way, what this law suit is all about, the inadequate information given to these people. And I think how they should have behaved, had they had the material facts in front of them at the time this offer was being made, is a question of fact.

MR. JAMIESON: A couple of quick comments, your Honor.

With regards to the statutory requirements argument, the Auto club did not file a summary of material modification because Mr. Schrock did not believe this was a material modification.

the point that Mr. Schrock makes in his affidavit is that had that summary been filed

with the Department of Labor, it would have been the same information that he provided to the employees in the announcements that went to the employees.

So, the information that he would have provided, had such a summary been required, or had he been required to provide the summary, would have been the same information that they received.

The only information that Mr. Colbert complains about is the actuarial information, the ten percent discount information, which the Court has already indicated needn't be provided based on Dooley, and it doesn't have to be build in as part of the information. I thought we dealt with that aspect of the informational argument.

In addition to that, the statutory authority, had the Auto Club been required to file a summary material modification, the filing of that summary, and particularly the notification to the participants wouldn't have been due until after the window was closed anyway.

By window,I mean the window of opportunity to accept the SERO. The participants wouldn't have been required, based on statute, to be notified or provided with information in the summary of material modification until after the window had closed.

Besides that, we were given the same information that would have been provided to the Department of Labor had Mr. Schrock felt such summary had been required.

And with regards to Mr. Schrock's information, I refer you to the affidavit that was dated November, 1989, and filed with our second brief, our response to Plaintiffs' brief.

The facts the Plaintiffs claim they didn't have are fats that the Court has said, and that is the ten percent information, was information that the Quo Club didn't need to put in there, because the revenue ruling required that it be put in 1983, and this was in 1980. And the spirit of the revenue ruling, based on Dooley and this Court's ruling, was not violated in not providing that specific ten percent information.

And the Court has determined that the use of the ten percent was fair in any event.

Those are my arguments with regard to any statutory requirement for filing. It really doesn't provide any cause of action to these Plaintiffs or provide any basis upon which to assess any damages to them because, first of all, the information that they had was what they were required to have; and the fact that the actuarial information wasn't specifically spelled out was not required. And I think I have made my argument with regard to that.

THE COURT: You have.

MR. JAMIESON: the other area of the Court's concern, that us the Auto Club's following the Plan in adopting the SERO.

MR. COLBERT: Two seconds:

On page 3 of my brief, as I stated 29 U.S.C. 1023(d)(b)(10) requires filing of actuarial assumptions. Mr. Schrock chose, by whatever reasons, not to file the actuarial assumptions.

then, with the filing he would have made

with the Secretary of Labor, as her claims in his affidavit, it would be inadequate.

And the first point that I would make, because if he wanted to file what he was required to do, and he wanted to inform them of what he was required to do, he certainly didn't inform them of the change in actuarial assumptions. And as my remembrance as to the Court, as far a Dooley was concerned, ruled that--adopted Dooley's holdings as to the revenue holding, but the Court still held out its lack of decision as to the total motion for summary disposition, because it did not know whether the statute or the plan itself required certain steps that weren't followed concerning the ten percent, six percent change in the actuarial assumption.

I though that's what we were addressing.

THE COURT: All right.

This case is getting to be a career case, what I call it, career case, since I have visited so many times.

And, by way of background once again, the plaintiffs in this case are three long-term

employees of the defendant who were offered and accepted early retirement under the Defendant's limited time only special early retirement offer, which we call SERO.

The suit itself originally involved three separate counts: Violation of ERISA in Count I; a breach of contract in Count 2; and age discrimination under Elliot-Larsen in Count 3.

The gravamen of the complaint has always been that the defendant wrongfully calculated benefits under its Retirement Plan when it used a ten percent discount factor in figuring the plaintiffs' lump sum special early retirement benefits. It's the Plaintiffs' claim that the defendant misrepresented that the SERO program was financially advantageous to the individuals involved in comparison to the regular retirement plan that would have been available.

Procedurally, of course, as we know, the defendant has brought this case up for summary judgment several times, and each time the Court has dismissed certain claims. That is to say, on April 19th of this year, the Sixth Circuit Court

of Appeals confirmed this Court in its earlier grant of summary judgment on Counts 2 and 3, and reversed grant of summary judgment as to Count 1; and accordingly, thereafter, on July 13, 1989, we again entertained a summary judgment motion as to Count 1.

At that time, the Court granted summary judgment as to Plaintiffs' claim of breach of fiduciary duty and self-dealing under ERISA.

When we looked to the substance of the claim that defendant had wrongfully used a ten percent, rather than a six percent interest rate in discounting to current value the lump sum retirement benefits which Defendants received.

Following the analysis that was made in the Seventh Circuit case to which counsel has made reference, Dooley v. American Airlines, 797 F.2d, 1986 case, if my memory serves me, we asked then the following three questions:

In the first instance, did the Retirement Plan offered by the defendant authorize the employer to change the Plan's interest rate?

The second question was: If the Plan

authorized alteration of the interest rate, does such employer discretion violate public policy?

And then, third, assuming that the Plan authorized discretion was not a public policy violation, did the ten percent figure used by the defendant in fact result in actuarial equivalence, such that lump sum retirees were receiving benefits equivalent to those received by retirees on the "monthly installment plan?"

Now that's how the Court sees it.

We granted summary judgment as to parts two and three of that analysis and denied summary judgment without prejudice as to part one. That is, it was unclear to us whether the defendant's plan allowed discretion as to actuarial assumptions; and, if it did, exactly what procedures the Plan required to be taken when making changes in actuarial assumptions, or what procedures had been followed.

Then, as I stated to Mr. Jamieson, thus therefore the only question of what the Plan required and whether the Plan requirements were in fact met and whether there was adherence to

them.

As to the factual background, the defendant's description of events surrounding the adoption of the SERO is as follows, if my understanding of the defendant's position is correct.

In roughly September, 1979, this gentleman to whom reference has been made, Frederick Schrock, who is Defendant's manager of Benefits Compensation, was assigned to the task of researching options and developing alternatives for a SERO Plan. In this capacity, Mr. Schrock worked with Defendant's actuarial experts, the Wyatt Company, to request that they develop various options for payment of benefits under a proposed SERO Plan.

Under the SERO that was designed by theses parties, salaried employees who otherwise qualified for early retirement would receive supplemental monthly benefits in addition to accrued monthly benefits that they would normally receive upon early retirement. Supplemental benefits had never before been

offered by this defendant, so I understand.

Under the proposed SERO, the employees would elect to receive their benefits in monthly payments or in a lump sum. Employees who opted to receive lump sum payments were promised the actuarial equivalent of the supplemental monthly benefits. The Wyatt Company informed Mr. Schrock that the use of ten percent discount factor would indeed actuarially equate with payment of the lump sum supplemental benefits under a monthly plan.

This was higher than the six percent discount factor used by the regular early retirement plan; however, ten percent was considered by the Wyatt Company and Mr. Schrock to be equitable because of the prevailing interest rate at the time that the SERO was being offered.

Mr. Schrock and then a Mr. Gawne, both of whom were members of the defendant's Pension Advisory Committee, which we will call Committee, consulted over Wyatt Company's recommendations and agreed to present it as recommended to the

Plaintiff's Board of Directors.

At its regularly scheduled June 1980 meeting, the Board considered and approved the SERO as recommended, although the Board did not specifically or separately consider the ten percent discount factor.

The SERO was announced and made available to employees in that month of June 1980, and each of our plaintiffs accepted the SERO and elected to receive benefits in a lump sum form.

In an analysis then of the problem with which we are confronted here today, the defendant argues in the first instance that the Plan conformed to ERISA's general requirements for establishment and amendment of the Retirement Plan. That is, ERISA's 1102(b) requires that nay employee benefits plan shall specifically describe all procedures for the allocation of responsibilities for operation and administration of the Plan, and shall also provide a procedure for amending the Plan and for identifying the persons who have authority to amend the plan.

The defendant's Plan complied with these

requirement. The Plan designated the employer as the entity with the sole responsibility for administering and operating the Plan.

Pursuant to Article IX, I think it was, at Section 2, the Committee was responsible for the day-to-day administration, but the Board was allocated the power to modify or to amend in whole or in part any or all of the provisions of the Plan, according to Article IX, and I think Section 1. Those provision, of course, comply with 1102(b).

The plaintiffs argue that Defendant was not in compliance with ERISA, because Defendant failed to file with the Secretary of Labor summaries of material modification, as ERISA requires. The stated purpose of the reporting and disclosure requirement is to afford employees notice of change in their benefit plans. The Firestone Tire and Rubber Company case made that clear to all of us. That is 57 U.S. Law Week Report 1989.

Well, factually, of course, the defendant admits that it did not file such a summary; by

affidavit, Schrock states that he did not believe the SERO to be a material modification.

The defendant comes back then and argues, however, even if plaintiffs are correct in their contentions that the SERO was a material modification, that Defendant's failure to file is certainly not an actionable omission. That's the posture which this faceoff finds itself. That is, each plaintiff was given several announcements, both written and at general meetings, which detailed the provisions of the SERO as well as what his own benefits in dollar amounts, that is, would be under the SERO; and according to the defendant, of course, that had the defendant filed anything with the Department of Labor it would have been materially a carbon copy of the SERO notice.

So, it is Defendant's position that Plaintiffs indeed received all of the notice that they would have received had Defendant actually filed a summary of material modification.

Courts, as you know, have almost uniformly held, in order for an employee to recover for

violation of ERISA reporting and disclosure requirements, he must establish that he was somehow prejudiced by the employer's non-compliance. The Jordan case, a Massachusetts case, 1985, 623 F. Supp. settles that for us.

Where the record shows that an employee had actual knowledge of the provisions of the Plan and the extent of his accumulated benefits, summary judgment may be granted to Defendant.

The Risch case settles that for us. That is our of the District of Wisconsin, 1984, in 588 F. Supp.,

Well, here the record shows that each plaintiff received a copy of what would have been filed with the Department of Labor.

Moreover, while the record does not indicate that Plaintiffs were informed of the use of the ten percent discount factor as such, it does indicate that each plaintiff was specifically informed of what his own benefit would be, both under the regular early retirement and the SERO, including the specific dollar amounts of a lump sum election.

In most cases, we assume that disclosure of the dollar amount would be more useful information than disclosure of the discount factor to be used for most lay employees, information regarding discount factors, actuarial equivalence, and mortality assumptions is too arcane to be really useful to the employee in making retirement decisions.

And the Court finds that under these circumstances, the plaintiffs were given adequate information to render any failure to comport with ERISA disclosure requirements non-actionable.

So much for that.

Next, Defendant argues that it acted pursuant to all applicable procedural plan provisions in adopting the SERO. That is, the SERO was duly adopted by the Board pursuant to its authority under Article IX, Section 1, and the Committee made the plan available to employees pursuant to its authority under Article IX, Section 2.

What is it, Article V, Section 5(b), Option F specifically states that in offering retirement

benefits, Defendant may utilize "such other actuarial equivalent option or options as shall be made available by the committee on a uniform and non-discriminatory basis."

And then, finally, the defendant argues, so the Court understands, that utilization of the ten percent discount factor for lump sum payment of the SERO benefits was indeed authorized under the Plan. Both Option F, to which reference has been made, and the SERO itself, promised that lump sum benefits would be actuarially equivalent to monthly benefits.

"Actuarially equivalent" as defined in Article II and Section 14 of the Plan, 'means a benefit of equivalent value when computed on the basis of actuarial tables and interest rates as were last adopted for this purpose by the employers and their actuaries and/or the Insurance Company."

So, the defendant argues that, because it had never before offered a SERO with supplemental benefits, the language "last adopted for this purpose" is inapplicable. That is, the six

percent discount rate remains in effect for regular early retirement benefits; the ten percent discount rate was de facto adopted by the Board at its June 24th, 1980 meeting, and was applicable only to the supplemental benefits which had never before been offered.

Because there was no "last adopted interest rate" applicable to supplemental monthly benefits, Defendant was not bound to use any discount rate in determining a lump sum equivalent of those benefits, so long as the discount factor used reasonably provided the equivalent value.

So, the only restriction was that the discount factor render the lump sum truly equivalent.

In this regard, Schrock relied upon the advise of the Wyatt Company.

Defendant has further provided several affidavits of experts attesting to the actuarial equivalence achieved by the ten percent discount rate.

Well, the plaintiffs again contest this

construction of the relevant events. In essence, the plaintiffs simply do not believe that any distinction should be made between "amendment" the plan and "adopting anew action to' the plan.

In the plaintiffs' opinion, the Plan defined "actuarial equivalent" as "of equivalent value when computed on the basis of such actuarial tables and interest rates as were last adopted for this purpose by the employers and their actuaries"; and the actuarial tables and interest rate last adopted for a lump sum payment was six percent.

Moreover, in the plaintiffs' opinion, the Board's June 4, 1980 action in adopting the SERO cannot be said to constitute de facto adoption of the new interest rate, because the interest rate on regular early retirement benefits did not change; the discount factor remained at six percent until 1982.

The plaintiffs also, of course, stress the fact that Defendant's Board did not actually specifically adopt the ten percent discount factor even for the SERO; the twenty-second

amendment, which added the SERO, defined the eligible employees and election period, and outlined the amount of special monthly benefits, but did not address how or with what discount factor a lump sum equivalent to such benefits was to be calculated.

Now gentlemen, it may be debatable as to whether or not the Board did indeed comply with each and every provision of its plan. However, this Court finds that any violation on the part of the defendant was simply a technical procedural violation of its own plan.

That is, the Court finds nothing in the provisions of the Plan which would prevent the Board from specifically adopting a ten percent discount factor applicable only to the SERO; the defendant would have been fully within its rights in adopting this provision.

The Court further finds that while the defendant did not specifically state it was adopting a ten percent discount factor applicable only to the SERO, that in fact was what Defendant did; and Defendant's only error was in failing to

announce specifically that it was making such an adoption.

Furthermore, the defendant in essence let the plaintiff know that it had adopted the ten percent discount factor insofar as the defendant laid out for each plaintiff what his regular early retirement monthly benefit and regular lump sum equivalent benefit would be compared with the SERO monthly benefit and the lump sum equivalent of his SERO monthly benefit.

Courts have held at other times and other places that a plaintiff has no right to an equitable remedy for procedural violations under ERISA, unless he was thereby been prejudiced. The Risch case to which the Court made earlier reference sets that forth, and this Court finds that in this case, the plaintiffs have failed to show any injury from Defendant's alleged failure to comply with the letter of its Plan. The plaintiffs have not, for example, shown that if the defendant had informed them specifically of the ten percent factor, rather than simply calculating their benefits for them, that

Plaintiffs would have declined the SERO; nor have the plaintiffs shown that the SERO was not advantageous compared to the regular plan. Rather, the way this Court read it, and in its considered judgment the plaintiffs have merely shown that it would have been more advantageous had the defendant kept the six percent factor.

This does not constitute an injury under ERISA. The fact that Defendant did not keep the six percent factor, it changed that factor to ten percent for SERO, as it was within its rights to do so.

Any failure to notify the plaintiffs of that change is not actionable in this Court's findings.

And the Court will direct your attention also to the Rubin case out of the Southern District of New York, 1983 case at 566 F. Supp.

So gentlemen, we have run around the bases on this case several times, but for now we hopefully are at an end and summary judgment is granted.

You can prepare an order.

MR. JAMIESON: I don't have one prepared, but I will submit an order by Monday.

THE COURT: Well, I think maybe I will have my clerk prepare one. Thank you, gentlemen. Court is in recess

REPORTER'S CERTIFICATE

I, BARBARA C. CHATMAN, Official Court Reporter for the United States District Court of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing proceedings were had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

BARBARA C. CHATMAN, CSR-0077

Dated: 4/6/90

Detroit, Michigan

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

KEITH FARRELL, WILLIAM MURRAY
and RICHARD RICHARDSON.

Plaintiffs,

-vs-

No-86-CV-73515-DT

AUTOMOBILE CLUB OF MICHIGAN Hon. George E. Woods

Defendant.

_____/

GARY A. COLBERT
Attorney for Plaintiffs

WILLIAM G. JAMIESON
MICHAEL B. HABER
Attorneys for Defendants

ORDER GRANTING DEFENDANT'S RENEWED MOTION
FOR SUMMARY JUDGMENT

At a session of said Court,
held in the Courtrooms, City
of Detroit, County of Wayne
and State of Michigan, on DEC 12, 1989

94

PRESENT: HONORABLE _____

U. S. DISTRICT COURT JUDGE

Defendant filed its Revised Motion For Summary Judgment. The parties filed Briefs and the Court heard argument. On July 13, 1989, the Court granted Defendant's Motion, in part, and denied it without prejudice, in part.

Defendant subsequently filed its Renewed Motion For Summary Judgment which challenged the portion of Plaintiffs'

SO ORDERED.

Approval as to form:

Gary Colbert by DC phone consent 12-7-89
GARY A. COLBERT (P 22961)
Attorney for Plaintiffs

William G. Jamieson
WILLIAM G. JAMIESON (P 15440)
Attorney for Defendant

GEORGE E. WOODS
U. S. DISTRICT COURT JUDGE

DEC 12 1989

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DENENBERG, TUFFLEY, BOCAN, JAMIESON, BLACK, HOPKINS & EWALD, P. C.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

KEITH FARRELL, WILLIAM MURRAY
and RICHARD RICHARDSON.

Plaintiffs,

-vs-

No-86-CV-73515-DT

AUTOMOBILE CLUB OF MICHIGAN Hon. George E. Woods

Defendant.

_____/

GARY A. COLBERT
Attorney for Plaintiffs
WILLIAM G. JAMIESON
MICHAEL B. HABER
Attorneys for Defendants

JUDGMENT FOR DEFENDANT

At a session of said Court, held in the United States Courthouse, in the City of Detroit, and State of Michigan, on the, '12th day of

December, 1989.

PRESENT: HONORABLE GEORGE E. WOODS

U. S. DISTRICT COURT JUDGE

The Court having issued an Order Granting Summary Judgment in favor of Defendant on Plaintiffs' remaining claims;

IT IS HEREBY ORDERED that Judgment be entered in favor of Defendant on all of Plaintiffs' remaining claims and that this case is hereby dismissed in its entirety with any issue concerning costs and attorney fees to await appeal.

claim which survived Defendant's Revised Motion For Summary Judgment. The parties filed Briefs and the Court heard argument. The Court granted Defendant's Renewed Motion for the reasons stated in the Bench Opinion of November 30, 1989.

Therefore, IT IS ORDERED that Summary Judgment be granted in favor of Defendant with respect to the remainder of this action including, but not limited to, the issues discussed by the Court in its Bench Opinion of July 13, 1989, and its Bench Opinion of November 30, 1989.

GEORGE E. WOODS
U. S. DISTRICT COURT JUDGE

Approval as to form:

Gary Colbert by JC phone consent 12-7-89
GARY A. COLBERT (P 22961)
Attorney for Plaintiffs

William G. Jamieson
WILLIAM G. JAMIESON (P 15440)
Attorney for Defendant

51677042.U26

DENENBERG, TUFFLEY, BOCAN, JAMIESON, BLACK, HOPKINS & EWALD, P.C.

NOT RECOMMENDED FOR PUBLICATION

MAR 1 1991

No# 90-1057

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NOT RECOMMENDED FOR FULL TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other [parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

KEITH FARRELL; WILLIAM MURRAY; and RICHARD RICHARDSON,

Plaintiffs-Appellants,

v.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

AUTOMOBILE CLUB OF MICHIGAN

Defendant-

Appellee_____

Decided and Filed_____

_____

BEFORE: RYAN and NORRIS, Circuit judges; and PECK#, Senior Circuit Judge.

PER CURIAM. Plaintiffs appeal the district court's grant of summary judgment to defendant.

Having had the benefit of oral argument, and having carefully considered the record on appeal and briefs of the parties, we are unable to say that the district court erred in granting summary judgment to defendant.

As the reasons why judgment should be entered for defendant have been articulated by the district court the issuance of a written opinion by this court would be duplicative and serve no useful purpose, Accordingly, the judgment of the district court is affirmed upon the reasoning set out by the court in its opinion delivered in open court on November 30, 1989.

APPENDIX B

APPLICABLE PORTIONS OF THE ACT

29 USC 1101 *et seq.*

(c) Effective date

TRANSITION RULES AND EFFECTIVE DATES

1461. Effective date; special rules

CROSS REFERENCES

Attempts to influence operations of plan, 18 USCS § 1954.
False statement in documents required, 18 USCS § 1027.
This chapter is referred to in 15 USCS §§ 77b, 631b; 18 USCS § 1027; 20 USCS § 1085; 26 USCS §§ 412, 414; 29 USCS § 441; 31 USCS § 68c; 45 USCS § 743.

PROTECTION OF EMPLOYEE BENEFIT RIGHTS

GENERAL PROVISIONS

§ 1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power. The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and

ore desirable in the interests of employees and their the protection of the revenue of the United States, and to free flow of commerce, that minimum standards be the equitable character of such plans and their financial

of interstate commerce and beneficiaries by requiring porting, setting standards of conduct, etc., for fiduciaries. lared to be the policy of this Act to protect interstate ne interests of participants in employee benefit plans and , by requiring the disclosure and reporting to participants of financial and other information with respect thereto, by dards of conduct, responsibility, and obligation for fiduci- benefit plans, and by providing for appropriate remedies, ady access to the Federal courts.

f interstate commerce, the Federal taxing power, and vesting of accrued benefits, setting minimum standards of g termination insurance. It is hereby further declared to his Act to protect interstate commerce, the Federal taxing nterests of participants in private pension plans and their improving the equitable character and the soundness of equiring them to vest the accrued benefits of employees eriods of service, to meet minimum standards of funding, plan termination insurance.

L. 93-406, Title I, Subtitle A, § 2, 88 Stat. 832.)

TORY; ANCILLARY LAWS AND DIRECTIVES

text:

referred to in this section, is the Employee Retirement rity Act of 1974, Act Sept. 2, 1974, P. L. 93-406, 88 Stat. appears generally as 29 USCS §§ 1001 et seq. For full of this Act, consult USCS Tables volumes.

Act Sept. 2, 1974, provided: "This Act may be cited as the etirement Income Security Act of 1974'. ". For full classi- is Act, consult USCS Tables volumes.

, 1980, P. L. 96-364, § 1, 94 Stat. 1208, provided: "This cited as the 'Multiemployer Pension Plan Amendments '. For full classification of such Act, consult USCS Tables

ions:

nization Plan No. 4 The following plan was prepared by and transmitted to the Senate and the House of Repre- Congress assembled, August 10, 1978, pursuant to the Chapter 9 of Title 5 of the United States Code [5 USCS]; such plan was amended Sept. 20, 1978.

RISA (29 USCS §§ 1001- es not involve any com- overnment of New Zea- Jnited States. (1979) ER- 7.

nefit plan was not main- nefit of persons substan- onresident aliens and was from ERISA's coverage b)(4), where plan covered corporation and employ- ncluding its United States of 25,277 employees of ubsidiaries, approximately tes citizens while remain- aliens of United States. er No. 80-5.

in 29 USCS § 1003(d)(4) outside of United States ans maintained in Virgin being specifically included ate" in § 1002(10). (1980) 80-49A.

urnished to partici- ployee benefit plan n 104(b) [29 USCS and to each benefi-

102(a)(1) [29 USCS

4(b)(3) [29 USCS and (c)].

reports to be filed in accordance with ary—

ection 102(a)(1) [29

ed in section 102(b)

102(a)(2) [29 USCS

quired by section 103

(5) terminal and supplementary reports as required by subsection (c) of this section.

(c) **Terminal and supplementary reports.** (1) Each administrator of an employee pension benefit plan which is winding up its affairs (without regard to the number of participants remaining in the plan) shall, in accordance with regulations prescribed by the Secretary, file such terminal reports as the Secretary may consider necessary. A copy of such report shall also be filed with the Pension Benefit Guaranty Corporation.

(2) The Secretary may require terminal reports to be filed with regard to any employee welfare benefit plan which is winding up its affairs in accordance with regulations promulgated by the Secretary.

(3) The Secretary may require that a plan described in paragraph (1) or (2) file a supplementary or terminal report with the annual report in the year such plan is terminated and that a copy of such supplementary or terminal report in the case of a plan described in paragraph (1) be also filed with the Pension Benefit Guaranty Corporation.

(d) **Cross references.** For regulations relating to coordination of reports to the Secretaries of Labor and the Treasury, see section 3004 [29 USCS § 1204].

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 1, § 101, 88 Stat. 840.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective date of section:

For effective date of this section, see 29 USCS § 1031(b), (c).

Other provisions:

Promulgation of regulations. For provisions authorizing the Secretary to promulgate regulations, see 29 USCS § 1031.

CODE OF FEDERAL REGULATIONS

Rules and regulations for reporting and disclosure, 29 CFR Part 2520.

CROSS REFERENCES

False statements in document, 18 USCS § 1027.

RESEARCH GUIDE

Am Jur:

Am Jur 2d New Topic Service, Pension Reform Act §§ 179, 180, 232.

Forms:

13 Federal Procedural Forms L Ed, Pensions and Retirement Systems §§ 53:12, 53:17.

Federal Regulation of Employment Service:

FRES, Introduction and Scope § 37:6.

FRES, Employee Benefits §§ 37:5, 37:6; 42:55.3.

Law Review Articles:

ERISA: Adequate Summary Plans Descriptions. 14 Houston L Rev 835, May 1977.

The Employee Retirement Income Security Act of 1974: Policies and Problems. 26 Syracuse L Rev 539.

Chadwick & Foster. Federal Regulation of Retirement Plans: The Quest for Parity. 28 Vand L Rev 641.

INTERPRETIVE NOTES AND DECISIONS

Under predecessor of reporting and disclosure provisions of this Act (29 USCS §§ 1021 et seq.), employer's medical, surgical, and hospital care insurance plan for employees, who had contractual relations with the insurer, was employee welfare benefit plan, and employer was administrator thereof, as against employer's contention that it acted merely as remitting agent, as "conduit to facilitate the payment by the employees of their monthly premiums." Wirtz v Gulf Oil Corp (1965, ED Pa) 239 F Supp 483, 58 BNA LRRM 2708, 51 CCH LC ¶ 19583.

Complaint which did not charge violation of any of requirements of predecessor of reporting and disclosure provisions of this Act (29 USCS §§ 1021 et seq.), nor seek to provide any penalty provided under those provisions for withholding required information, but sought instead, court review of business judgments of administrators of welfare and pension fund and court regulation of fund's operations, would be dismissed for failure to state cause of action. Moyer v Kirkpatrick (1967, ED Pa) 265 F Supp 348, 64 BNA LRRM 2669, 55 CCH LC ¶ 11832, affd (CA3 Pa) 387 F2d 955, 67 BNA LRRM 2139, 57 CCH LC ¶ 12396.

Under predecessor to ERISA, plaintiff who was neither participant nor beneficiary in pension plans had no standing to demand accounting from plan; under predecessor statute, even participant or beneficiary was not entitled to anything but description of plan. Dinko v Wall (1976, SD NY) 421 F Supp 207, 93 BNA LRRM 2066, 78 CCH LC ¶ 11331, affd without op (CA2 NY) 559 F2d 1202, 95 BNA LRRM 2984, 81 CCH LC ¶ 13264.

District Court had no jurisdiction to hear claim that company violated Employee Retirement Income Security Act disclosure requirements (29 USCS §§ 1021(a), 1022(2), 1022(b)) in connection with plaintiff's husband's selection of single-life annuity retirement plans which left plaintiff without payments after husband's death, where plaintiff was not beneficiary under plan and complaint made no allegation that plaintiff fit definition of beneficiary; however, even if it were assumed that plaintiff could be considered "designated beneficiary" under plan because of life insurance proceeds she received, there was no merit to allegation that company failed to comply with disclosure requirements. Lerra v Monsanto Co. (1981, DC Mass) 521 F Supp 1257.

Employee pension benefit plans were subject to predecessor of reporting and disclosure provisions of this Act (29 USCS §§ 1021 et seq.), and "qualified" plans are subject to the provisions of Internal Revenue Code. Dictaphone Corp. v Clemons (1971, Colo App) 488 P2d 226, 50 ALR3d 1266.

§ 1022. Plan description and summary plan description

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 104(b) [29 USCS § 1024(b)]. The summary plan description shall include the information described in subsection (b), shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) shall be written in a manner calculated to be understood by the average plan

participant and shall be furnished in accordance with section 104(b)(1) [29 USCS § 1024(b)(1)].

(2) A plan description (containing the information required by subsection (b)) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 104(a)(1) [29 USCS § 1024(a)(1)]. Any material modification in the terms of the plan and any change in the information described in subsection (b) shall be filed in accordance with section 104(a)(1)(D) [29 USCS § 1024(a)(1)(D)].

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 503 of this Act [29 USCS § 1133]).

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 1, § 102, 88 Stat. 841.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective date of section:

For effective date of this section, see 29 USCS § 1031(b), (c).

Other provisions:

Promulgation of regulations. For provisions authorizing the Secretary to promulgate regulations, see 29 USCS § 1031.

CODE OF FEDERAL REGULATIONS

Rules and regulations for reporting and disclosure, 29 CFR Part 2520.

CROSS REFERENCES

False statements in documents, 18 USCS § 1027.

RESEARCH GUIDE

Am Jur:

Am Jur 2d New Topic Service, Pension Reform Act §§ 200, 201.

Forms:
13 Federal Procedural Forms L Ed. Pensions and Retirement Systems §§ 53:17, 53:39.

§ 1023. Annual reports

(a) **Publication and Filing.** (1)(A) An annual report shall be published with respect to every employee benefit plan to which this part applies. Such report shall be filed with the Secretary in accordance with section 104 (a) [29 USCS § 1024(a)], and shall be made available and furnished to participants in accordance with section 104(b) [29 USCS § 1024(b)].

(B) The annual report shall include the information described in subsections (b) and (c) and where applicable subsections (d) and (e) and shall also include—

(i) a financial statement and opinion, as required by paragraph (3) of this subsection, and

(ii) an actuarial statement and opinion, as required by paragraph (4) of this subsection.

(2) If some or all of the information necessary to enable the administrator to comply with the requirements of this title is maintained by—

(A) an insurance carrier or other organization which provides some or all of the benefits under the plan, or holds assets of the plan in a separate account,

(B) a bank or similar institution which holds some or all of the assets of the plan in a common or collective trust or a separate trust, or custodial account, or

(C) a plan sponsor as defined in section 3(16)(B) [29 USCS § 1002(16)(B)],

such carrier, organization, bank, institution, or plan sponsor shall transmit and certify the accuracy of such information to the administrator within 120 days after the end of the plan year (or such other date as may be prescribed under regulations of the Secretary).

(3)(A) Except as provided in subparagraph (C), the administrator of an employee benefit plan shall engage, on behalf of all plan participants, an independent qualified public accountant, who shall conduct such an examination of any financial statements of the plan, and of other books and records of the plan, as the accountant may deem necessary to enable the accountant to form an opinion as to whether the financial statements and schedules required to be included in the annual report by subsection (b) of this section are presented fairly in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year. Such examination shall be conducted in accordance with generally accepted auditing standards, and shall involve such tests of the books and records of the plan as are considered necessary by the independent qualified public accountant. The independent qualified public accountant shall also

offer his opinion as to whether the separate schedules specified in subsection (b)(3) of this section and the summary material required under section 104(b)(3) [29 USCS § 1024(b)(3)] present fairly, and in all material respects the information contained therein when considered in conjunction with the financial statements taken as a whole. The opinion by the independent qualified public accountant shall be made a part of the annual report. In a case where a plan is not required to file an annual report, the requirements of this paragraph shall not apply. In a case where by reason of section 104(a)(2) [29 USCS § 1024(a)(2)] a plan is required only to file a simplified annual report, the Secretary may waive the requirements of this paragraph.

(B) In offering his opinion under this section the accountant may rely on the correctness of any actuarial matter certified to by an enrolled actuary, if he so states his reliance.

(C) The opinion required by subparagraph (A) need not be expressed as to any statements required by subsection (b)(3)(G) prepared by a bank or similar institution or insurance carrier regulated and supervised and subject to periodic examination by a State or Federal agency if such statements are certified by the bank, similar institution, or insurance carrier as accurate and are made a part of the annual report.

(D) For purposes of this title, the term "qualified public accountant" means—

(i) a person who is a certified public accountant, certified by a regulatory authority of a State;

(ii) a person who is a licensed public accountant, licensed by a regulatory authority of a State; or

(iii) a person certified by the Secretary as a qualified public accountant in accordance with regulations published by him for a person who practices in States where there is no certification or licensing procedure for accountants.

(4)(A) The administrator of an employee pension benefit plan subject to the reporting requirement of subsection (d) of this section shall engage, on behalf of all plan participants, an enrolled actuary who shall be responsible for the preparation of the materials comprising the actuarial statement required under subsection (d) of this section. In a case where a plan is not required to file an annual report, the requirement of this paragraph shall not apply, and, in a case where by reason of section 104(a)(2) [29 USCS § 1024(a)(2)], a plan is required only to file a simplified report, the Secretary may waive the requirement of this paragraph.

(B) The enrolled actuary shall utilize such assumptions and techniques as are necessary to enable him to form an opinion as to whether the contents of the matters reported under subsection (d) of this section—

(i) are in the aggregate reasonably related to the experience of the plan and to reasonable expectations; and

(ii) represent his best estimate of anticipated experience under the plan.

The opinion by the enrolled actuary shall be made with respect to, and shall be made a part of, each annual report.

(C) For purposes of this title, the term "enrolled actuary" means an actuary enrolled under subtitle C of title III of this Act [26 USCS § 7701; 29 USCS §§ 1241, 1242].

(D) In making a certification under this section the enrolled actuary may rely on the correctness of any accounting matter under section 103(b) [29 USCS § 1023(b)] as to which any qualified public accountant has expressed an opinion, if he so states his reliance.

(b) **Financial statement.** An annual report under this section shall include a financial statement containing the following information:

(1) With respect to an employee welfare benefit plan: a statement of assets and liabilities; a statement of changes in fund balance; and a statement of changes in financial position. In the notes to financial statements, disclosures concerning the following items shall be considered by the accountant: a description of the plan including any significant changes in the plan made during the period and the impact of such changes on benefits; a description of material lease commitments, other commitments, and contingent liabilities; a description of agreements and transactions with persons known to be parties in interest; a general description of priorities upon termination of the plan; information concerning whether or not a tax ruling or determination letter has been obtained; and any other matters necessary to fully and fairly present the financial statements of the plan.

(2) With respect to an employee pension benefit plan: a statement of assets and liabilities, and a statement of changes in net assets available for plan benefits which shall include details of revenues and expenses and other changes aggregated by general source and application. In the notes to financial statements, disclosures concerning the following items shall be considered by the accountant: a description of the plan including any significant changes in the plan made during the period and the impact of such changes on benefits; the funding policy (including policy with respect to prior service cost), and any changes in such policies during the year; a description of any significant changes in plan benefits made during the period; a description of material lease commitments, other commitments, and contingent liabilities; a description of agreements and transactions with persons known to be parties in interest; a general description of priorities upon termination of the plan; information concerning whether or not a tax ruling or determination letter has been obtained; and any other matters necessary to fully and fairly present the financial statements of such pension plan.

(3) With respect to all employee benefit plans, the statement required under paragraph (1) or (2) shall have attached the following information in separate schedules:

(A) a statement of the assets and liabilities of the plan aggregated by categories and valued at their current value, and the same data displayed in comparative form for the end of the previous fiscal year of the plan;

(B) a statement of receipts and disbursements during the preceding twelve-month period aggregated by general sources and applications;

(C) a schedule of all assets held for investment purposes aggregated and identified by issuer, borrower, or lessor, or similar party to the transaction (including a notation as to whether such party is known to be a party in interest), maturity date, rate of interest, collateral, par or maturity value, cost, and current value;

(D) a schedule of each transaction involving a person known to be party in interest, the identity of such party in interest and his relationship or that of any other party in interest to the plan, a description of each asset to which the transaction relates; the purchase or selling price in case of a sale or purchase, the rental in case of a lease, or the interest rate and maturity date in case of a loan; expenses incurred in connection with the transaction; the cost of the asset, the current value of the asset, and the net gain (or loss) on each transaction;

(E) a schedule of all loans or fixed income obligations which were in default as of the close of the plan's fiscal year or were classified during the year as uncollectable and the following information with respect to each loan on such schedule (including a notation as to whether parties involved are known to be parties in interest): the original principal amount of the loan, the amount of principal and interest received during the reporting year, the unpaid balance, the identity and address of the obligor, a detailed description of the loan (including date of making and maturity, interest rate, the type and value of collateral, and other material terms), the amount of principal and interest overdue (if any) and an explanation thereof;

(F) a list of all leases which were in default or were classified during the year as uncollectable; and the following information with respect to each lease on such schedule (including a notation as to whether parties involved are known to be parties in interest): the type of property leased (and, in the case of fixed assets such as land, buildings, leasehold, and so forth, the location of the property), the identity of the lessor or lessee from or to whom the plan is leasing, the relationship of such lessors and lessees, if any, to the plan, the employer, employee organization, or any other party in interest, the terms of the lease regarding rent, taxes, insurance, repairs, expenses, and renewal options; the date the leased property was purchased and its cost, the date the property was leased and its approximate value at

such date, the gross rental receipts during the reporting period, expenses paid for the leased property during the reporting period, the net receipts from the lease, the amounts in arrears, and a statement as to what steps have been taken to collect amounts due or otherwise remedy the default;

(G) if some or all of the assets of a plan or plans are held in a common or collective trust maintained by a bank or similar institution or in a separate account maintained by an insurance carrier or a separate trust maintained by a bank as trustee, the report shall include the most recent annual statement of assets and liabilities of such common or collective trust, and in the case of a separate account or a separate trust, such other information as is required by the administrator in order to comply with this subsection; and

(H) a schedule of each reportable transaction, the name of each party to the transaction (except that, in the case of an acquisition or sale of a security on the market, the report need not identify the person from whom the security was acquired or to whom it was sold) and a description of each asset to which the transaction applies; the purchase or selling price in case of a sale or purchase, the rental in case of a lease, or the interest rate and maturity date in case of a loan; expenses incurred in connection with the transaction; the cost of the asset, the current value of the asset, and the net gain (or loss) on each transaction. For purposes of the preceding sentence, the term "reportable transaction" means a transaction to which the plan is a party if such transaction is—

(i) a transaction involving an amount in excess of 3 percent of the current value of the assets of the plan;

(ii) any transaction (other than a transaction respecting a security) which is part of a series of transactions with or in conjunction with a person in a plan year, if the aggregate amount of such transactions exceeds 3 percent of the current value of the assets of the plan;

(iii) a transaction which is part of a series of transactions respecting one or more securities of the same issuer, if the aggregate amount of such transactions in the plan year exceeds 3 percent of the current value of the assets of the plan; or

(iv) a transaction with or in conjunction with a person respecting a security, if any other transaction with or in conjunction with such person in the plan year respecting a security is required to be reported by reason of clause (i).

(4) The Secretary may, by regulation, relieve any plan from filing a copy of a statement of assets and liabilities (or other information) described in paragraph (3)(G) if such statement and other information is filed with the Secretary by the bank or insurance carrier which maintains the common or collective trust or separate account.

(c) **Information to be furnished by administrator.** The administrator shall furnish as a part of a report under this section the following information:

(1) The number of employees covered by the plan.

(2) The name and address of each fiduciary.

(3) Except in the case of a person whose compensation is minimal (determined under regulations of the Secretary) and who performs solely ministerial duties (determined under such regulations), the name of each person (including but not limited to, any consultant, broker, trustee, accountant, insurance carrier, actuary, administrator, investment manager, or custodian who rendered services to the plan or who had transactions with the plan) who received directly or indirectly compensation from the plan during the preceding year for services rendered to the plan or its participants, the amount of such compensation, the nature of his services to the plan or its participants, his relationship to the employer of the employees covered by the plan, or the employee organization, and any other office, position, or employment he holds with any party in interest.

(4) An explanation of the reason for any change in appointment of trustee, accountant, insurance carrier, enrolled actuary, administrator, investment manager, or custodian.

(5) Such financial and acturial information including but not limited to the material described in subsections (b) and (d) of this section as the Secretary may find necessary or appropriate.

(d) **Actuarial statement.** With respect to an employee pension benefit plan (other than (A) a profit sharing, savings, or other plan, which is an individual account plan, (B) a plan described in section 301(b) [29 USCS § 1081(b)], or (C) a plan described both in section 4021(b) [29 USCS § 1321(b)] and in paragraph (1), (2), (3), (4), (5), (6), or (7) of section 301(a) [29 USCS § 1081(a)(1), (2), (3), (4), (5), (6), or (7)]) an annual report under this section for a plan year shall include a complete actuarial statement applicable to the plan year which shall include the following:

(1) The date of the plan year, and the date of the actuarial valuation applicable to the plan year for which the report is filed.

(2) The date and amount of the contribution (or contributions) received by the plan for the plan year for which the report is filed and contributions for prior plan years not previously reported.

(3) The following information applicable to the plan year for which the report is filed: the normal costs, the accrued liabilities, an identification of benefits not included in the calculation; a statement of the other facts and actuarial assumptions and methods used to determine costs, and a justification for any change in actuarial assumptions or cost methods; and the minimum contribution required under section 302 [29 USCS § 1082].

(4) The number of participants and beneficiaries, both retired and nonretired, covered by the plan.

(5) The current value of the assets accumulated in the plan, and the present value of the assets of the plan used by the actuary in any computation of the amount of contributions to the plan required under section 302 [29 USCS § 1082] and a statement explaining the basis of such valuation of present value of assets.

(6) The present value of all of the plan's liabilities for nonforfeitable pension benefits allocated by the termination priority categories as set forth in section 4044 of this Act [29 USCS § 1344], and the actuarial assumptions used in these computations. The Secretary shall establish regulations defining (for purposes of this section) "termination priority categories" and acceptable methods, including approximate methods, for allocating the plan's liabilities to such termination priority categories.

(7) A certification of the contribution necessary to reduce the accumulated funding deficiency to zero.

(8) A statement by the enrolled actuary—

(A) that to the best of his knowledge the report is complete and accurate, and

(B) the requirements of section 302(c)(3) [29 USCS § 1082(c)(3)] (relating to reasonable actuarial assumptions and methods) have been complied with.

(9) A copy of the opinion required by subsection (a)(4).

(10) A statement by the actuary which discloses—

(A) any event which the actuary has not taken into account, and

(B) any trend which, for purposes of the actuarial assumptions used, was not assumed to continue in the future,

but only if, to the best of the actuary's knowledge, such event or trend may require a material increase in plan costs or required contribution rates.

(11) Such other information regarding the plan as the Secretary may by regulation require.

(12) Such other information as may be necessary to fully and fairly disclose the actuarial position of the plan.

Such actuary shall make an actuarial valuation of the plan for every third plan year, unless he determines that a more frequent valuation is necessary to support his opinion under subsection (a)(4) of this section.

(e) Statement from insurance company, insurance service, or other similar organizations which sell or guarantee plan benefits. If some or all of the benefits under the plan are purchased from and guaranteed by an insurance company, insurance service, or other similar organization, a report under this section shall include a statement from such insurance company, service, or other similar organization covering the plan year and enumerating—

(1) the premium rate or subscription charge and the total premium or subscription charges paid to each such carrier, insurance service, or

other similar organization and the approximate number of persons covered by each class of such benefits; and

(2) the total amount of premiums received, the approximate number of persons covered by each class of benefits, and the total claims paid by such company, service, or other organization; dividends or retroactive rate adjustments, commissions, and administrative service or other fees or other specific acquisition costs paid by such company, service, or other organization; any amounts held to provide benefits after retirement; the remainder of such premiums; and the names and addresses of the brokers, agents, or other persons to whom commissions or fees were paid, the amount paid to each, and for what purpose. If any such company, service, or other organization does not maintain separate experience records covering the specific groups it serves, the report shall include in lieu of the information required by the foregoing provisions of this paragraph (A) a statement as to the basis of its premium rate or subscription charge, the total amount of premiums or subscription charges received from the plan, and a copy of the financial report of the company, service, or other organization and (B) if such company, service, or organization incurs specific costs in connection with the acquisition or retention of any particular plan or plans, a detailed statement of such costs.

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 1, § 103, 88 Stat. 841; Sept. 26, 1980, P. L. 96-364, Title III, § 307, 94 Stat. 1295.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This part", referred to in this section, is Part 1 of Subtitle B of Title I of Act Sept. 2, 1974, P. L. 93-406, 88 Stat 840, popularly known as the Employee Retirement Income Security Act of 1974, which appears generally as 29 USCS §§ 1021 et seq. For full classification of this Part, consult USCS Tables volumes.

"This title", referred to in this section, is Title I of Act Sept. 2, 1974, P. L. 93-406, 88 Stat. 832, popularly known as the Employee Retirement Income Security Act of 1974, which appears generally as 29 USCS §§ 1001 et seq. For full classification of this Title, consult USCS Tables volumes.

Effective date of section:

For effective date of this section, see 29 USCS § 1031(b), (c).

Amendments:

1980. Act Sept. 26, 1980 (effective upon enactment on 9/26/80, as provided by 29 USCS § 1461(e)), in subsec. (d), redesignated former paras. (10) and (11) as paras. (11) and (12) respectively, and added a new para. (10).

Other provisions:

Promulgation of regulations. For provisions authorizing the Secretary to promulgate regulations, see 29 USCS § 1031(c).

Consolidation of actuarial reports. The Secretary of the Treasury and Secretary of Labor are to take such steps as may be necessary to assure coordination to the maximum extent feasible between the actuarial reports required by subsec. (d) of this section and 26 USCS § 6059; see § 1033(c) of Act Sept. 2, 1974, which appears as 26 USCS § 6059 note.

CODE OF FEDERAL REGULATIONS

Rules and regulations for reporting and disclosure. 29 CFR Part 2520.

CROSS REFERENCES

False statement in required documents. 18 USCS § 1027.
This section is referred to in 29 USCS §§ 1021, 1024, 1029; 31 USCS § 68a.

RESEARCH GUIDE

Am Jur:
Am Jur 2d New Topic Service, Pension Reform Act §§ 203–219

Forms:
13 Federal Procedural Forms L Ed, Pensions and Retirement Systems § 53:17.

Federal Regulation of Employment Service:
FRES, Employee Benefits §§ 40:38; 42:33, 42:50, 42:55.3, 42:130, 42:132, 42:133.

INTERPRETIVE NOTES AND DECISIONS

For purposes of 29 CFR § 2520.104-46, waiving requirement of 29 USCS § 1023(a)(3)(a) that accountant's opinion be included in annual report for plans with less than 100 participants, profit sharing programs maintained by 5 participating employers under profit sharing plan should be treated as single plan and participants of each of profit sharing programs be aggregated, where plan provides for pooling of all assets in trust and for allocation to each participant's account of proportionate share of gains and losses on such pooled assets so that financial information with respect to which accountant's opinion would be required is relevant to all participants and provisions of plan contemplate that profit sharing programs of participating employers and company were meant to be treated as single entity for corporate purposes. (1979) ERISA Op Letter No. 79-87.

§ 1024. Filing and furnishing of information

(a) Filing of annual report, plan description, summary plan description, and modifications and changes with Secretary. (1) The administrator of any employee benefit plan subject to this part shall file with the Secretary—

(A) the annual report for a plan year within 210 days after the close of such year (or within such time as may be required by regulations promulgated by the Secretary in order to reduce duplicative filing);

(B) the plan description within 120 days after such plan becomes subject to this part and an updated plan description, no more frequently than once every 5 years, as the Secretary may require;

(C) a copy of the summary plan description at the time such summary plan description is required to be furnished to participants and beneficiaries pursuant to subsection (b)(1)(B) of this section; and

(D) modifications and changes referred to in section 102(a)(2) [29 USCS § 1022(a)(2)] within 60 days after such modification or change is adopted or occurs, as the case may be.

The Secretary shall make copies of such plan descriptions, summary plan descriptions, and annual reports available for inspection in the public document room of the Department of Labor. The administrator shall also furnish to the Secretary, upon request, any documents relating to the employee benefit plan, including but not limited to the bargaining agreement, trust agreement, contract, or other instrument under which the plan is established or operated.

(2)(A) With respect to annual reports required to be filed with the Secretary under this part, he may by regulation prescribe simplified annual reports for any pension plan which covers less than 100 participants. In addition, and without limiting the foregoing sentence, the Secretary may waive or modify the requirements of section 103(d)(6) [29 USCS § 1023(d)(6)] in such cases or categories of cases as to which he finds that (i) the interests of the plan participants are not harmed thereby and (ii) the expense of compliance with the specific requirements of section 103(d)(6) [29 USCS § 1023(d)(6)] is not justified by the needs of the participants, the Pension Benefit Guaranty Corporation, and the Department of Labor for some portion or all of the information otherwise required under section 103(d)(6) [29 USCS § 1023(d)(6)].

(B) Nothing contained in this paragraph shall preclude the Secretary from requiring any information or data from any such plan to which this part applies where he finds such data or information is necessary to carry out the purposes of this title nor shall the Secretary be precluded from revoking provisions for simplified reports for any such plan if he finds it necessary to do so in order to carry out the objectives of this title.

(3) The Secretary may by regulation exempt any welfare benefit plan from all or part of the reporting and disclosure requirements of this title, or may provide for simplified reporting and disclosure if he finds that such requirements are inappropriate as applied to welfare benefit plans.

(4) The Secretary may reject any filing under this section—

(A) if he determines that such filing is incomplete for purposes of this part; or

(B) if he determines that there is any material qualification by an accountant or actuary contained in an opinion submitted pursuant to section 103(a)(3)(A) or section 103(a)(4)(B) [29 USCS § 1023(a)(3)(A) or (4)(B)].

(5) If the Secretary rejects a filing of a report under paragraph (4) and if a revised filing satisfactory to the Secretary is not submitted within 45

days after the Secretary makes his determination under paragraph (4) to reject the filing, and if the Secretary deems it in the best interest of the participants, he may take any one or more of the following actions—

(A) retain an independent qualified public accountant (as defined in section 103(a)(3)(D) [29 USCS § 1023(a)(3)(D)]) on behalf of the participants to perform an audit,

(B) retain an enrolled actuary (as defined in section 103(a)(4)(C) of this Act [29 USCS § 1023(a)(4)(C)]) on behalf of the plan participants, to prepare an actuarial statement.

(C) bring a civil action for such legal or equitable relief as may be appropriate to enforce the provisions of this part, or

(D) take any other action authorized by this title.

The administrator shall permit such accountant or actuary to inspect whatever books and records of the plan are necessary for such audit. The plan shall be liable to the Secretary for the expenses for such audit or report, and the Secretary may bring an action against the plan in any court of competent jurisdiction to recover such expenses.

(b) **Publication of summary plan description and annual report to participants and beneficiaries of plan.** Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary, plan description, and all modifications and changes referred to in section 102(a)(1) [29 USCS § 1022(a) (1)]—

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part.

The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part an updated summary plan description described in section 102 [29 USCS § 1022] which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in section 102 [29 USCS § 1022] every tenth year after the plan becomes subject to this part. If there is a modification or change described in section 102(a)(1) [29 USCS § 1022(a)(1)], a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

(2) The administrator shall make copies of the plan description and the latest annual report and the bargaining agreement, trust agreement, contract, or other instruments under which the plan was established or is operated available for examination by any plan participant or beneficiary in the principal office of the administrator and in such other places as may be necessary to make available all pertinent information to all participants (including such places as the Secretary may prescribe by regulations).

(3) Within 210 days after the close of the fiscal year of the plan, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, a copy of the statements and schedules, for such fiscal year, described in subparagraphs (A) and (B) of section 103(b)(3) [29 USCS § 1023 (b)(3)(A), (B)] and such other material as is necessary to fairly summarize the latest annual report.

(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may be regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

(c) **Statement of rights.** The Secretary may by regulation require that the administrator of any employee benefit plan furnish to each participant and to each beneficiary receiving benefits under the plan a statement of the rights of participants and beneficiaries under this title.

(d) **Cross references** For regulations respecting coordination of reports to the Secretaries of Labor and the Treasury, see section 3004 [29 USCS § 1204].

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 1, § 104, 88 Stat. 847.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This part", referred to in this section, is Part 1 of Subtitle B of Title I of Act Sept. 2, 1974, P. L. 93-406, 88 Stat 840, popularly known as the Employee Retirement Income Security Act of 1974, which appears generally as 29 USCS §§ 1021 et seq. For full classification of this Part, consult USCS Tables volumes.

"This title", referred to in this section, is Title I of Act Sept. 2, 1974, P. L. 93-406, 88 Stat. 832, popularly known as the Employee Retirement Income Security Act of 1974, which appears generally as 29 USCS §§ 1001 et seq. For full classification of this Title, consult USCS Tables volumes.

INTERPRETIVE NOTES AND DECISIONS

ERISA legislative history and its fiduciary responsibility provisions (29 USCS §§ 1101-1114) indicate that Congress intended benefit fund trustees to possess broad managerial and administrative discretion in operation of their funds. Taylor v Bakery & Confectionary Union & Industry International Welfare Fund (1978, ED NC) 455 F Supp 816.

Congress enacted ERISA (29 USCS § 1101-1381) to increase number of individuals in employer financed benefit plans and to protect employees' right to receive benefits; ERISA is designed to provide safeguards with respect to establishment, operation and administration of plans. Fine v Semet (1981, SD Fla) 514 F Supp 34.

§ 1102. Establishment of plan

(a) **Named fiduciaries.** (1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this title, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

(b) **Requisite features of plan.** Every employee benefit plan shall—

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this title,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 405(c)(1) [29 USCS § 1105(c)(1)]),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

(c) **Optional features of plan.** Any employee benefit plan may provide—

(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator);

(2) that a named fiduciary, or a fiduciary designated by a named fiduciary pursuant to a plan procedure described in section 405(c)(1) [29 USCS § 1105(c)(1)], may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan; or

(3) that a person who is a named fiduciary with respect to control or management of the assets of the plan may appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan.

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 4, § 402, 88 Stat. 875.)

ally, welfare plan's funding policy should set forth at least sources of funds for payment of benefits, methods of obtaining such funds, and plan's short- and long-run financial needs. (1978) ERISA Op Letter No. 78-10.

§ 1103. Establishment of trust

(a) **Benefit plan assets to be held in trust; authority of trustees.** Except as provided in subsection (b), all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 402(a) [29 USCS § 1102(a)] or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that—

(1) the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this Act, or

(2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 402(c)(3) [28 USCS § 1102(c)(3)].

(b) **Exceptions.** The requirements of subsection (a) of this section shall not apply—

(1) to any assets of a plan which consist of insurance contracts or policies issued by an insurance company qualified to do business in a State;

(2) to any assets of such an insurance company or any assets of a plan which are held by such an insurance company;

(3) to a plan—

(i) some or all of the participants of which are employees described in section 401(c)(1) of the Internal Revenue Code of 1954 [26 USCS § 401(c)(1)]; or

(ii) which consists of one or more individual retirement accounts described in section 408 of the Internal Revenue Code of 1954 [26 USCS § 408], to the extent that such plan's assets are held in one or more custodial accounts which qualify under section 401(f) or 408(h) of such Code [26 USCS § 401(f) or § 408(h)], whichever is applicable;

(4) to a plan which the Secretary exempts from the requirement of subsection (a) and which is not subject to any of the following provisions of this Act—

(A) part 2 of this subtitle [29 USCS §§ 1051 et seq.],

(B) part 3 of this subtitle [29 USCS §§ 1081 et seq., or

(C) title IV of this Act; or

(5) to a contract established and maintained under section 403(b) of the Internal Revenue Code of 1954 [26 USCS § 403(b)] to the extent that

the assets of the contract are held in one or more custodial accounts pursuant to section 403(b)(7) of such Code [26 USCS § 403(b)(7)].

(6) Any plan, fund or program under which an employer, all of whose stock is directly or indirectly owned by employees, former employees or their beneficiaries, proposes through an unfunded arrangement to compensate retired employees for benefits which were forfeited by such employees under a pension plan maintained by a former employer prior to the date such pension plan became subject to this Act.

(c) **Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets.** (1) Except as provided in paragraph (2), (3), or (4) or subsection (d), or under section 4042 [29 USCS § 1342] and 4044 [29 USCS § 1344] (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

(2)(A) In the case of a contribution, or a payment of withdrawal liability under part 1 of subtitle E of part iv—

(i) made by an employer to a plan (other than a multiemployer plan) by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution, and

(ii) made by an employer to a multiemployer plan by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) of the Internal Revenue Code of 1954 [26 USCS § 401(a)] or the trust which is part of such plan is exempt from taxation under section 501(a) of such Code [26 USCS § 501(a)]), paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake.

(B) If a contribution is conditioned on qualification of the plan under section 401, 403(a), or 405(a) of the Internal Revenue Code of 1954 [26 USCS §§ 401, 403(a) or 405(a)], and if the plan does not qualify, then paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the date of denial of qualification of the plan.

(C) If a contribution is conditioned upon the deductibility of the contribution under section 404 of the Internal Revenue Code of 1954 [26 USCS § 404], then, to the extent the deduction is disallowed, paragraph (1) shall not prohibit the return to the employer of such contribution (to the extent disallowed) within one year after the disallowance of the deduction.

(3) In the case of a contribution which would otherwise be an excess contribution (as defined in section 4972(b) of the Internal Revenue Code

of 1954 [26 USCS § 4972(b)]) paragraph (1) shall not prohibit a correcting distribution with respect to such contribution from the plan to the employer to the extent permitted in such section to avoid payment of an excise tax on excess contributions under such section.

(4) In the case of a withdrawal liability payment which has been determined to be an overpayment, paragraph (1) shall not prohibit the return of such payment to the employer within 6 months after the date of such determination.

(d)**Termination of plan.** (1) Upon termination of a pension plan to which section 4021 [29 USCS § 1321] does not apply at the time of termination and to which this part [29 USCS §§ 1101 et seq.] applies (other than a plan to which no employer contributions have been made) the assets of the plan shall be allocated in accordance with the provisions of section 4044 of this Act [29 USCS § 1344], except as otherwise provided in regulations of the Secretary.

(2) The assets of a welfare plan which terminates shall be distributed in accordance with the terms of the plan, except as otherwise provided in regulations of the Secretary.

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 4, § 403, 88 Stat. 876; Sept. 26, 1980, P. L. 96-364, Title III, § 310, Title IV, §§ 402(b)(2), 410(a), 411(c), 94 Stat. 1296, 1299, 1308.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This Act", referred to in this section, is the Employee Retirement Income Security Act of 1974, Act Sept. 2, 1974, P. L. 93-406, 88 Stat. 829, which appears generally as 29 USCS §§ 1001 et seq. For full classification of this Act, consult USCS Tables volumes.

"Title IV of this Act", referred to in this section, is Title IV of Act Sept. 2, 1974, P. L. 93-406, 88 Stat. 1003, popularly known as the Employee Retirement Income Security Act of 1974, which appears generally as 29 USCS §§ 1301 et seq. For full classification of such Title, consult USCS Tables volumes.

"Part 1 of subtitle E of part IV", referred to in subsec. (c)(2)(A), is probably intended to be a reference to Part 1 of Subtitle E of Title IV of Act Sept. 2, 1974, P. L. 93-406, which appears 29 USCS §§ 1381 et seq., inasmuch as Part 1 of Subtitle E does not contain a part IV, but rather appears as part of Title IV of Act Sept. 2, 1974.

Effective date of section:

For effective date of this section, see 29 USCS § 1114.

Amendments:

1980. Act Sept. 26, 1980, (effective upon enactment on 9/26/80 as provided by 29 USCS § 1461(e)) in subsec. (a)(1), substituted "Act" for "Title"; in subsec. (b), added para. (6); and in subsec. (c)(1), substituted ", (3) or (4)" for "(3)".

§ 1104. Fiduciary duties

(a) **Prudent man standard of care.** (1) Subject to sections 403(c) and (d) [29 USCS § 1103(c) and (d)], 4042 [29 USCS § 1342], and 4044 [29 USCS § 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV.

(2) In the case of an eligible individual account plan (as defined in section 407(d)(3) [29 USCS § 1107(d)(3)]), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 407(d)(4) and (5) [29 USCS § 1107(d)(4) and (5)]).

(b) **Indicia of ownership of assets outside jurisdiction of district courts.** Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) **Control over assets by participant or beneficiary.** In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 4, § 404, 88 Stat. 877; Sept. 26, 1980, P. L. 96-364, Title III, § 309, 94 Stat. 1296.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This title", referred to in this section, is Title I of Act Sept. 2, 1974, P. L. 93-406, 88 Stat. 832, popularly known as the Employee Retirement Income Security Act of 1974, which appears generally as 29

Plan was exempted, provided that terms and conditions of this transaction were at least as favorable to Plan as those obtainable in similar transaction with unrelated third party. (Prohibited Transaction Exemption 81-104, 46 Fed. Reg. 57202).

Contribution by employer of promissory notes secured by first deeds of trust on improved real property to Profit Sharing Plan (Plan) was exempted where contribution would be one-time transaction, fair market value of notes had been determined by independent appraiser, if notes were not contributed, Plan would have received only dividends for 1980, employer would pay any cost incurred in proposed transaction, each note would be held by trustee with power of sale until note is repaid in full, and Trustee had determined that proposed transaction was in best interest of Plan's participants and beneficiaries. PTE 81-114 (46 Fed. Reg. 59330).

§ 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act [29 USCS § 1111].

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this title if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 4, § 409, 88 Stat. 886.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This title", referred to in this section, is Title I of Act Sept. 2, 1974, P. L. 93-406, 88 Stat. 832, popularly known as the Employee Retirement Income Security Act of 1974, which appears generally as 29 USCS §§ 1001 et seq. For full classification of this Title, consult USCS Tables volumes.

Effective date of section:

For effective date of this section, see 29 USCS § 1114.

RESEARCH GUIDE

Am Jur:

Am Jur 2d New Topic Service, Pension Reform Act § 527.

Am Jur Proof of Facts:

Wrongful Termination Of Retirement Benefits, 13 Am Jur Proof of Facts 2d, p. 531.

Forms:

13 Federal Procedural Forms L Ed, Pensions and Retirement Systems §§ 53:18, 53:74, 53:75, 53:93.

Federal Regulation of Employment Service:

FRES, Employee Benefits §§ 40:29, 40:31; 41:232; 43:37, 43:47, 43:54, 43:76.5.

INTERPRETIVE NOTES AND DECISIONS

In prosecution for embezzling funds from employee pension benefit plan, whether or not particular fund was "employee pension benefit fund," as defined in predecessor of this section (29 USCS § 1002), was question for jury under proper instructions. United States v Daley (1972, CA1 Mass) 454 F2d 505.

Congress did not intend, by enactment of predecessor of reporting and disclosure provisions of this Act (29 USCS §§ 1021 et seq.), to confer upon courts broad regulatory power over operation of welfare funds. Moyer v Kirkpatrick (1967, ED Pa) 265 F Supp 348, 64 BNA LRRM 2669, 55 CCH LC ¶ 11832, affd (CA3 Pa) 387 F2d 955, 67 BNA LRRM 2139, 57 CCH LC ¶ 12396.

§ 1132. Civil enforcement

(a) **Persons empowered to bring a civil action.** A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USCS § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 USCS § 1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (i).

(b) **Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions.** (1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of the Internal Revenue Code of 1954 [26 USCS §§ 401(a), 403(a), or 405(a)] (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) with respect [respect] to a violation of, or the enforcement of, parts 2 and 3 of this subtitle [29 USCS §§ 1051 et seq., §§ 1081 et seq.] (relating to participation, vesting, and funding), only if—

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case

of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 515 [29 USCS § 1145].

(c) Administrator's refusal to supply requested information. Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(d) Status of employee benefit plan as entity. (1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

(e) Jurisdiction. (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties. The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(2)

No. 91-328

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

KEITH FARRELL, WILLIAM MURRAY,
RICHARD RICHARDSON,

Petitioners,

v.

AUTOMOBILE CLUB OF MICHIGAN,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Petitioners may maintain an action for breach of fiduciary duty under the Employee Retirement Income Security Act ("ERISA"), where they request relief for themselves as individual plan beneficiaries, yet ERISA, as interpreted by this Court in *Massachusetts Mutual Life Insurance Co. v Russell*, permits such an action only where relief is sought for the plan as a whole?

II. Whether Respondent complied with both ERISA and its own retirement plan in using a 10% discount factor when calculating the lump sum, actuarial equivalent of new supplemental early retirement benefits, where (1) the District Court found substantial compliance, and (2) Petitioners failed to present any evidence establishing non-compliance?

III. Whether Respondent's alleged violation of ERISA reporting requirements is actionable, where (1) Petitioners were apprised of all pertinent, required information, and (2) Petitioners were not injured or prejudiced by this alleged violation?

IV. Whether Petitioners may seek review of the Court of Appeals' affirmance of the District Court's dismissal of pendent state law claims, where the Court of Appeal's Judgment was issued March 28, 1989, yet Petitioners failed to seek review of this Judgment until May of 1991?

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In The

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KEITH FARRELL, WILLIAM MURRAY,
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Petitioners,

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AUTOMOBILE CLUB OF MICHIGAN,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Automobile Club of Michigan ("Respondent"), files its Brief in Opposition to the Petition for Writ of Certiorari ("the Petition") of Petitioners, Keith Farrell, William Murray and Richard Richardson ("Petitioners").[1]

[1] The caption of this case contains the names of all parties. Accordingly, repetition is unnecessary pursuant to Rules 15.2 and 24.1(b) of the Rules of the Supreme Court of the United States. In addition, pursuant to Rule 29.1 of the Rules of the Supreme Court of the United States, Respondent states that there are no parent companies or subsidiaries (not wholly owned) of Respondent that require listing.

OPINIONS BELOW

With respect to all issues excluding pendent jurisdiction, the bench opinions of the United States District Court for the Eastern District of Michigan are set forth in Appendix A to the Petition, pages 42-56 (decision of July 13, 1989) and pages 76-93 (decision of November 30, 1989). An Order and Judgment granting Respondent's Motions for Summary Judgment, entered December 12, 1989, are set forth in Appendix A to the Petition, pages 94-99.[2] The March 1, 1991, per curiam Opinion of the Court of Appeals, which affirmed the opinions of the District Court for all the reasons stated therein, is unpublished and is set forth in Appendix A to the Petition, pages 100-101.

With respect to the pendent jurisdiction issue, the unpublished Memorandum Opinion and Order and Judgment of the United States District Court for the Eastern District of Michigan, dated December 18, 1987, are set forth in Appendix A to the Petition, pages 2-10. The March 28, 1989, Opinion of the Court of Appeals, affirming the dismissal of Petitioners' pendent state law claims, is set forth in Appendix A to the Petition, pages 11-31, and is reported in the Federal Reporter, Second Series. *Farrell v Automobile Club of Michigan*, 870 F.2d 1129 (6th Cir. 1989).

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[2] The Order and Judgment are not properly organized in Appendix A. The Order is actually found at pages 94, 95 and 99. The Judgment is found starting at pages 97 and 98, and concluding on page 96.

JURISDICTION

With respect to all issues excluding pendent jurisdiction, the Judgment of the Court of Appeals was entered March 1, 1991 (Appendix A to the Petition, pages 100-101). Jurisdiction of this Court is invoked by Petitioners pursuant to 28 U.S.C. § 1254(1).

With respect to the pendent jurisdiction issue, the Judgment of the Court of Appeals was entered March 28, 1989 (Appendix A to the Petition, pages 11-31). Petitioners contend jurisdiction exists pursuant to 28 U.S.C. § 1254(1). Respondent disagrees. Petitioners failed to file a Petition for Writ of Certiorari within ninety (90) days of the March 28, 1989, Court of Appeals Judgment, as required by 28 U.S.C. § 2101(c) and Rule 13.1 of the Rules of the Supreme Court of the United States. Accordingly, as to pendent jurisdiction, the Petition is jurisdictionally deficient.

STATUTE INVOLVED

The statute involved in this matter is the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq.

STATEMENT OF THE CASE

The Statement of the Case found in the Petition is confusing, contains a great deal of irrelevant information[3]

[3] Throughout the Petition, reference is made to "facts" which purportedly imply that Respondent was engaging in age

(Continued on following page)

and contains many misstatements of fact. Consequently, Respondent will first present a clear and concise statement of the underlying facts, and will then discuss the most egregious factual misstatements made by Petitioners.

A. Statement Of Material Facts

1. Nature of this case

Petitioners are former management employees of Respondent. In July 1980, Respondent extended a Special Early Retirement Offer ("SERO") to employees who were eligible for early retirement under Respondent's existing pension plan ("the Plan"). Each Petitioner elected to accept the SERO, and opted to receive retirement benefits in one lump sum (as opposed to monthly payments). Petitioners brought the instant action, claiming that Respondent improperly calculated the lump sum equivalent of their SERO supplemental monthly benefits in violation of ERISA. Petitioners did not claim, nor have they ever claimed, that the calculation of their accrued ERISA benefits was inaccurate or improper.

Petitioners argue that Respondent's use of a 10% discount factor for converting their SERO supplemental

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(Continued from previous page)

discrimination in connection with the Special Early Retirement Offer. Respondent categorically denies any discriminatory intent. More importantly, there is no age discrimination claim properly before this Court, as the District Court declined to exercise pendent jurisdiction over this state law claim. Therefore, any "facts" or argument concerning age discrimination are irrelevant.

monthly benefits into a lump sum breached ERISA-imposed fiduciary duties, and was improper under ERISA regulatory provisions and the terms of the Plan. In addition, Petitioners argue that Respondent violated ERISA reporting and/or disclosure requirements related to the SERO. Finally, Petitioners argue that the District Court's dismissal of their pendent state law breach of contract and age discrimination claims was inappropriate.

Respondent contends that Petitioners do not have a viable ERISA claim for breach of fiduciary duty, and the use of a 10% lump sum discount factor 1) did not violate any ERISA regulatory provisions, and 2) was authorized under the Plan. Respondent also asserts that any alleged ERISA reporting violation is not actionable given the substantial disclosures made to Petitioners concerning the SERO, along with the fact that Petitioners are unable to demonstrate that they were prejudiced or injured as a result of the alleged reporting violation. Finally, Respondent contends that Petitioners' argument concerning the dismissal of pendent state law claims 1) is jurisdictionally out of time, and 2) is moot.[4]

2. The implementation of the SERO

In or about September 1979, Mr. Frederick Schrock, Respondent's Manager of Benefits and Compensation,

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[4] This is due to the fact that Petitioners have learned that these pendent state law claims, pending in the Michigan state courts (specifically, the Wayne County Circuit Court), have been settled, and the underlying state court action has been dismissed.

was assigned the task of researching options and developing alternatives for providing a special early retirement program for Respondent's salaried employees. Mr. Schrock's responsibilities included administration of Respondent's existing retirement program. He also served as a member and/or Secretary of Respondent's Pension Advisory Committee ("the Committee"). Mr. Schrock contacted Respondent's actuaries, the Wyatt Company, to request that they develop various options for payment of benefits under a proposed SERO.

Under the proposed SERO, Respondent's salaried employees who otherwise qualified for early retirement would receive **supplemental** monthly benefits **in addition to** the regular accrued monthly benefits they would normally receive upon early retirement. Thus, the SERO was composed of two types of benefits: regular (pre-existing) accrued monthly benefits available upon early retirement and supplemental monthly benefits (offered for the first time in the SERO). The proposed SERO also gave eligible employees the option to receive their benefits in a lump sum. Employees who opted to receive lump sum payment of SERO benefits would receive the "actuarial equivalent" of supplemental monthly benefits that would otherwise be received.

The Wyatt Company informed Mr. Schrock that use of a 10% discount factor would actuarially equate lump sum payment of SERO supplemental benefits to payment of SERO supplemental benefits under a monthly plan.[5]

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[5] Pursuant to Plan requirements, Respondent continued to use the pre-existing 6% lump sum discount factor for **regular accrued** monthly benefits (as opposed to **supplemental** monthly benefits).

The Wyatt Company also determined that use of a discount rate even higher than 10% would be actuarially equitable given the prevailing interest rates of the time.

Based on the information provided by the Wyatt Company, Mr. Schrock determined that use of a 10% factor to discount SERO supplemental benefits of employees who elected to receive benefits in lump sum was appropriate. Mr. Schrock then approached Mr. James Gawne, Respondent's Personnel Director and Chairman of the Committee, with the recommendation of a 10% lump sum discount factor for SERO supplemental benefits. After consultation, Mr. Schrock and Mr. Gawne agreed to recommend a 10% lump sum discount factor when the proposed SERO was presented to Respondent's Board of Directors. At its regularly scheduled June 24, 1980 meeting, Respondent's Board approved the proposed SERO as recommended.

Respondent announced the availability of the SERO to all employees on June 30, 1980. The announcement provided, in part, that eligible employees who accepted the SERO would "receive the benefits presently specified in the retirement plan, plus . . . additional benefits." The announcement also provided that if the lump sum option was taken, the employee would receive the "lump sum actuarial equivalent" of supplemental monthly benefits. After this initial announcement, all employees eligible for the SERO (including each Petitioner) received a follow-up notice which 1) reiterated the general terms of SERO benefits, and 2) contained a personal benefit statement which disclosed benefits available under normal early retirement and those available under the SERO. Each eligible employee was also given a retirement benefits

statement which detailed the various payment options available to employees who accepted the SERO.

In addition to the various notices and personal benefit statements concerning the SERO which were sent to all eligible employees, Respondent conducted group meetings (one of which Petitioner Farrell attended) to discuss existing pension plans and other benefits for retired employees, and to answer employee questions concerning retirement and the SERO. Respondent also encouraged eligible employees to contact the Personnel Department with any questions about the SERO. Petitioner Richardson did in fact both phone and personally meet with Mr. Schrock, as well as meet with Mr. Gawne, to discuss the SERO, and he received all the retirement information he requested.

In total, 247 employees were eligible for the SERO, and 135 accepted, including all three Petitioners. Each Petitioner elected to receive benefits in lump sum. Petitioner Murray received $191,174.00, Petitioner Farrell received $151,210.00 and Petitioner Richardson received $180,057.00. Each Petitioner received the amount they were advised they were eligible to receive in their Personal Benefit Statement.

3. Proceedings below

Petitioners' description of the "Litigation History" of this case (Petition, pages 16-21) is essentially accurate, but requires supplementation in two important respects. First, Petitioners never filed a Petition for Writ of Certiorari with this Court after the Court of Appeals' March 28, 1989, affirmance of the District Court's dismissal of

Petitioners' pendent state law claims. Second, the District Court's dismissal of Petitioners' ERISA claim for benefits [pursuant to 29 U.S.C. § 1132(a)(1)(B)] was based on three material facts to which there was no genuine issue: 1) the SERO 10% lump sum discount factor was actuarially equivalent (Appendix A to the Petition, page 52), 2) the Plan permitted the use of the 10% lump sum discount factor (Appendix A to Petition, pages 90-91), and 3) because Petitioners were provided with sufficient information concerning the SERO, and were not prejudiced by any failure to file materials with the Department of Labor, any alleged failure by Respondent to comply with ERISA reporting requirements was not actionable (Appendix A to Petition, pages 85-86).

B. Misstatements Of Fact In The Petition

While the Petition contains many misstatements concerning facts either not relevant to this case or not supported by the evidence, there are four particular misstatements which might mislead this Court into believing the facts are something other than what they really are. Pursuant to its obligation under Rule 15.1 of the Rules of the Supreme Court of the United States, Respondent will address each misstatement separately below.

The first misstatement is found on page 8 of the Petition, where it is alleged that Respondent failed to disclose the "changed" discount rate to Petitioners. This is misleading in several respects. First, there was no "changed" lump sum discount rate for SERO supplemental benefits, as these **supplemental** benefits had never

before been offered. The 10% rate was the one and only discount rate ever utilized at the time Petitioners opted for lump sum supplemental benefits. Second, this ignores all of the information (discussed in the previous section) that Respondents provided to Petitioners concerning the SERO. [This information is found at R. 105: Reply to Plaintiffs' Brief in Opposition to Defendant's Renewed Motion for Summary Judgment ("Renewed Motion Reply Brief"), Exhibits 2, 3 and 4]. Finally, it ignores the fact that under then applicable law, Respondent was under no obligation to disclose its lump sum discount rate.

The second misstatement is found on pages 8 and 9 of the Petition, where Petitioners represent that Petitioner Richardson was given false information when he asked further questions about the SERO, and Petitioner Murray was denied important information he requested. These assertions are not supported by the record. With respect to Petitioner Murray, the **only** claimed support for this assertion is page 47 of his deposition (R. 52). However, this testimony does not relate to information concerning the SERO he asked for but did not receive. Rather, this testimony simply refers to Petitioner Murray's suspicions that he was being "nudged" to accept the SERO because of his age.[6]

The allegations concerning Petitioner Richardson are similarly unfounded. The Petition relies on a "comparison" of a late 1980 letter by Mr. Schrock to Petitioner Richardson (answering Petitioner Richardson's request

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[6] Once again, not only does Respondent deny any discriminatory intent, this testimony is irrelevant as there is no age discrimination claim properly before this Court.

for additional SERO information) and handwritten calculations of projected retirement benefits for Petitioner Richardson (presumably made by the Wyatt Company). (R. 50: Plaintiffs' Brief in Response to Defendant's Motion for Partial Dismissal, Exhibits 4 and 5). However, a review of these two documents demonstrates that there are no inconsistencies. Indeed, the Wyatt calculations are incorporated in the Schrock letter. More importantly, Petitioners' own expert, Craig Arnold, testified that Respondent responded appropriately to Petitioner Richardson's requests for additional information. (R. 51: Deposition of Craig Arnold, p.85).

The third misstatement, found at page 10 of the Petition, is a statement that Respondent "misrepresented" to employees that the SERO provided "payment of your earned benefit without reduction." Once again, there is no support in the record for this assertion. The statement in question (that there would be no reduction in earned benefits) was made by Respondent to explain one of several advantages of the SERO. Absent the SERO, the Plan provided that retirement benefits (earned benefits) would be reduced upon early retirement (as permitted by existing regulations). One component of SERO supplemental benefits was the elimination of this pre-existing reduction in earned benefits, thereby resulting in a net increase in benefits for SERO participants.[7] Accordingly, the effect of the SERO was that there would no

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[7] According to Petitioners' own expert Respondent kept its word, as regular accrued monthly benefits were fairly figured and computed. (R. 55: Continuing Deposition of Craig Arnold, p.74).

longer be a reduction in earned benefits, a fact accurately conveyed to Petitioners.

The fourth misstatement, found throughout pages 10 through 15 of the Petition, is a claim that Petitioners' expert, Mr. Arnold, concluded that Respondent 1) acted arbitrarily and capriciously in offering the SERO, and 2) the adoption of the 10% lump sum discount violated Plan provisions. This representation ignores critical testimony by Mr. Arnold that motivated the District Court to dismiss this action and the Court of Appeals to affirm this dismissal:

> [Mr. Jamieson (counsel for respondent)] I am not sure you answered my question. But is there anything wrong, improper, illegal, about using a 10% interest factor under the conditions that it was used in this plan?
>
> [Mr. Arnold] That's a two-part question – I'll have to answer in a two-part answer. One, the use of those two assumptions are not – is not, in my opinion, **is not to be wrong, illegal or wrongful**. My concern is that **there is no authority for its application that I can find – one**.

(R. 51: Deposition of Craig Arnold, p.49) (emphasis added).

This testimony establishes that 1) there was nothing wrong with Respondent's use of the 10% lump sum discount factor (it provided actuarial equivalence), and 2) there is no support for the assertion that use of the 10% discount factor for SERO supplemental monthly benefits violated Plan provisions. Not only does this testimony vitiate any other speculation entered into by Mr. Arnold

concerning the implementation of the SERO, it undercuts Petitioners' entire case.

REASONS FOR DENYING THE PETITION

Preliminarily, two important points must be made. First, to once again clarify matters, the SERO consisted of two components: **regular accrued** monthly benefits available upon early retirement and **supplemental** monthly benefits. Petitioners do not dispute Respondent's calculation of **regular accrued** monthly benefits, or the application of the 6% lump sum discount factor to these benefits. Petitioners' challenge is to the application of the 10% lump sum discount factor to SERO **supplemental** monthly benefits.

Second, the questions presented in the Petition turn solely upon alleged questions of fact or the construction of the Plan.[8] They do not involve important questions of federal law, nor do they involve conflicts between several United States Courts of Appeals. These alleged fact-based questions are not the type for which this Court grants certiorari. *National Labor Relations Board v Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 176, 102 S. Ct. 216, 70 L.Ed.2d 325 (1981); *Rudolph v United States*, 370 U.S. 269, 270, 82 S. Ct. 1277, 8 L.Ed.2d 484 (1962) (per curiam); *Southern Power Co. v North Carolina*

[8] Respondents deny that any genuine questions of fact exist. Instead, as is established below (particularly in Sections B and C), the District Court analyzed undisputed facts and clear Plan language in light of ERISA, and reached the inevitable conclusion that Petitioners' claims lacked merit.

Public Service Co., 263 U.S. 508, 509, 44 S. Ct. 164, 68 L.Ed. 413 (1924). For this reason alone the Petition should be denied.

A. The Petition Should Be Denied Because Petitioners' Breach Of Fiduciary Duty Claim Is Untenable As A Matter Of Law

1. This Court's decision in *Massachusetts Mutual* precludes Petitioners' claim

Throughout this litigation Petitioners have made confusing arguments and claims with respect to what they seek to recover pursuant to ERISA.[9] On the one hand, Petitioners seem to be making a claim for benefits owed pursuant to 29 U.S.C. § 1132(a)(1)(B) (discussed in further detail in Sections B and C below). On the other hand, much of what Petitioners have argued has been phrased with respect to a "breach of fiduciary duty" by Respondent, a claim that would be brought pursuant to 29 U.S.C. § 1109. Respondent denies that any breach of fiduciary duties has occurred. However, the existence of such a breach is a question that need not be answered. To the extent Petitioners are attempting to assert some sort of § 1109 claim for breach of fiduciary duties, the claim is untenable as a matter of law.

29 U.S.C. § 1109 provides that any fiduciary of an employee benefit plan that breaches its duties to plan participants shall be liable to the plan for any losses

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[9] This Section addresses arguments made in pages 22 through 41 of the Petition.

resulting from the breach. This Court has previously held that a § 1109 suit for breach of fiduciary duties **must** be brought for the plan as a whole, not for individual plan beneficiaries. *Massachusetts Mutual Life Insurance Co. v Russell*, 473 U.S. 134, 140, 105 S. Ct. 3085, 87 L.Ed.2d 96 (1985). Such an action must be brought pursuant to 29 U.S.C. § 1132(a)(2) ("[a] civil action may be brought . . . by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 U.S.C. § 1109]).[10]

Pursuant to *Massachusetts Mutual*, Petitioners' § 1109 claim for breach of fiduciary duties is unacceptable. It is not disputed that Petitioners are requesting relief for themselves as individual plan beneficiaries, rather than relief for the Plan as a whole. As the Court of Appeals properly recognized when the instant case was first presented, such a fiduciary duty claim runs counter to *Massachusetts Mutual*. *Farrell*, 870 F.2d at 1133-1134 (Appendix

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[10] Petitioners seem to argue that a breach of fiduciary duty claim could also be brought for individual plan beneficiaries (as opposed to for the plan as a whole) pursuant to 29 U.S.C. § 1132(a)(1)(B)("[a] civil action may be brought . . . to recover benefits due to him under the terms of his plan"). However, this is not consistent with the language of this particular ERISA statute. A breach of fiduciary duty violates § 1109, and § 1109 claims are actionable pursuant to § 1132(a)(2). There is no reason to make them implicitly actionable pursuant to § 1132(a)(1)(B), particularly since the sole motivation for doing so is to circumvent *Massachusetts Mutual*. *See Bryant v International Fruit Produce Co., Inc.*, 886 F.2d 132, 135 (6th Cir. 1989); *Mehl v Navistar International Corp.*, 670 F. Supp. 239, 242 (N.D. Ill. 1987).

A to the Petition, pages 26-27).[11] Notwithstanding the considerable effort expended by Petitioners concerning this issue, the outcome is clear: the Petition must be denied.

2. Petitioners' "spirit" of Rev. Rul. 79-90 argument is without merit

Petitioners contend that Respondent's failure to disclose that a 10% lump sum discount would be applied to SERO supplemental benefits violated the "spirit" of Rev. Rul. 79-90, 1979-1 C.B. 156. They argue that this alleged violation constitutes a breach of fiduciary duty and supports their claim for benefits pursuant to 29 U.S.C. § 1132(a)(1)(B). Because Petitioners make this argument in connection with the first three questions presented to this Court, Respondent will dispose of it before turning to Petitioners' 29 U.S.C. § 1132(a)(1)(B) claims.

Rev. Rul. 79-90 provides that whenever the amount of a benefit in an employee benefit plan will be determined by use of actuarial assumptions, "the assumptions to be used must be specified within the plan in a manner which precludes employer discretion." This might arguably require an employer to specify any lump sum discount factors used in the calculation of benefits. However, as to

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[11] Indeed, the Court of Appeals gave Petitioners a great benefit of the doubt by construing their contentions as claims for benefits as opposed to § 1109 breach of fiduciary duty claims. If Petitioners were found to be asserting § 1109 claims, this entire case would have been time-barred. *See Farrell, supra.*

employee benefit plans in existence prior to March 12, 1979, Rev. Rul. 79-90 specifically delays its own effect until the first plan year after December 31, 1983. Since Respondent's Plan (of which the SERO was a part) existed prior to March 12, 1979, compliance with Rev. Rul. 79-90 was not required until after 1983 – well after the time period pertinent to the instant action.

Petitioners do not deny that on its face Rev. Rul. 79-90 does not apply to this case. Instead, they attempt to have it retroactively applied by invoking its "spirit." This argument is contrary to the Internal Revenue Service's belief that Rev. Rul. 79-90 was a novel decision, which should be phased in over a period of time. *Dooley v American Airlines, Inc.*, 797 F.2d 1447, 1452 (7th Cir. 1986), *cert denied*, 479 U.S. 1032, 107 S. Ct. 879, 93 L.Ed.2d 833 (1987). By attempting to invoke the "spirit" of this Revenue Ruling, Petitioners ask this Court to find that Respondent's noncompliance with regulations inapplicable during the time period pertinent to this action is an actionable omission. As stated in *Dooley*, this Court should "decline the . . . invitation to take this step." 797 F.2d at 1452. Respondent can and should only be held accountable for complying with legal requirements existing at the time the SERO was adopted, offered and accepted.

B. The Petition Should Be Denied Because Respondent Complied With Both ERISA And Its Own Retirement Plan In Using A 10% Discount Factor In Calculating Lump Sum SERO Supplemental Benefits

Petitioners make two arguments in connection with their 29 U.S.C. § 1132(a)(1)(B) claim for benefits. First,

they contend that Respondent did not comply with ERISA or the Plan in adopting the SERO and utilizing a 10% discount factor. Second, they contend that Respondent violated ERISA reporting requirements. The first argument will be addressed in the following discussion[12], while the second will be discussed in Section C. The result is the same as to both arguments – they do not justify granting the Petition.

1. The Plan complied with ERISA

While never stating so directly, Petitioners imply that the Plan itself did not comply with ERISA's general requirements for the establishment, administration and modification of retirement plans. This is patently untrue. ERISA's requirements in this regard are found at 29 U.S.C. § 1102(b), which provides in pertinent part:

> § 1102. **Establishment of Plan.**
>
> (b) **Requisite features of plan.** Every employee benefit plan shall –
>
> > (2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure developed in Section 405(c)(1) [29 U.S.C. § 1105(c)(1)]),
> >
> > (3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan . . .

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[12] This Section addresses arguments made in pages 51 through 62 of the Petition.

The Twenty-First Restatement and Twenty-Second Amendment of the Plan were in effect at the time the SERO was offered and accepted.[13] General responsibilities for administration of the Plan were outlined in Article IX, Section 1:

> *Section 1. Allocation of Responsibility Among Fiduciaries.*
>
> . . . In general, the Employer shall have the sole responsibility for making the contributions necessary to provide benefits under the Plan as specified in Article VIII, and shall have the sole authority to appoint and remove the Trustee and members of the Committee, to select and change Insurance Companies, and to amend or terminate, in whole or in part, this Plan or the Trust. The Employer shall be the Plan Administrator for purposes of ERISA. The Committee shall have the sole responsibility for the day-to-day administration of the Plan, which responsibility is specifically described herein.

The Committee's functions were set out in further detail in Article IX, Section 2 of the Plan, which provides in pertinent part:

> *Section 2. Advisory Committee.*
>
> The Committee shall be responsible for the general administration of the Plan and for carrying out the provisions thereof. The Committee may from time to time establish rules for the administration of the Plan and the transaction of the

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[13] These are attached as Exhibit B to R.93: Defendant's Revised Motion for Summary Judgment, and pertinent provisions are quoted in R.99: Defendant's Renewed Motion for Summary Judgment.

> Plan's business. In making any determination or rule, the Committee shall pursue uniform policies, and shall not discriminate in favor of or against any Employee or group of Employees. The Committee shall make all determinations as to the right of any person to a benefit . . .

While the Plan provided that the Committee was responsible for its general administration, the power to amend or modify was allocated to Respondent's Board:

> *Section 1. Amendment*
>
> The Employers jointly and severally reserve and shall have the right at any time and from time to time by action of their respective governing bodies to modify or amend in whole or in part any or all of the provisions of the Plan . . .

Article IX, Section 1.

The above quoted Plan provisions complied with ERISA requirements for plan features. The Plan allocated responsibility for operation and administration, and identified the persons with authority to amend the Plan. This satisfies the requirements of 29 U.S.C. § 1102(b). *Henne v Allis-Chalmers Corp.*, 660 F. Supp. 1464, 1481 (E.D. Wis. 1987). *See also Nachwalter v Christie*, 805 F.2d 956, 960 (11th Cir. 1986). Accordingly, because the Plan complied with ERISA, Petitioners' claim will have merit only if the adoption of the SERO or the use of the 10% discount factor did not comply with the Plan.

2. The adoption of the SERO, and use of the 10% discount factor, complied with the Plan

At its June 24, 1980, meeting, Respondent's Board approved the SERO as proposed. The Board acted pursuant to its authority to "modify or amend in whole or in part any or all of the provisions of the Plan" under Article IX, Section 1 of the Plan (quoted above). Subsequent to Board approval, the Committee made the SERO available to eligible employees pursuant to its responsibility for general administration of the Plan (as outlined in Article IX, Section 2, also quoted above). Consequently, the adoption of the SERO complied with the Plan.

Utilization of a 10% discount factor for lump sum payment of SERO supplemental monthly benefits also complied with the Plan. Article V, Section 5(b) Option F of the Plan required that all retirement benefit payment options made available by the Committee be actuarially equivalent to other Plan payment options. In Article II, Section 14, the Plan defined "actuarial equivalent" as follows:

> "Actuarial Equivalent" means a benefit of equivalent value when computed on the basis of such actuarial tables and interest rates as were last adopted for this purpose by the Employers and their actuaries and/or the Insurance Company.

In determining the appropriateness of the 10% lump sum discount factor for SERO supplemental monthly benefits, the critical language in the definition of "actuarial equivalent" is that benefits must have "equivalent value when computed on the basis of . . . interest rates **as were last adopted for this purpose**" by Respondent. (Emphasis

added). As previously stated, Respondent had never before offered supplemental monthly benefits in an early retirement benefits payment option. Therefore, Respondent was not bound to use a particular interest rate in computing the lump sum actuarial equivalent of SERO supplemental monthly benefits since there was no interest rate that had been "last adopted for this purpose."[14]

Although Respondent was not bound to use a specific interest rate, it did have to provide lump sum payment of SERO supplemental monthly benefits of "equivalent value." In recommending a 10% discount factor for SERO supplemental monthly benefits, Mr. Schrock relied on information provided by the Wyatt Company, Respondent's actuaries. They told him that use of a 10% factor would actuarially equate lump sum payment of SERO supplemental benefits to payment of these benefits on a monthly basis. Indeed, the Wyatt Company determined that a higher rate would be actuarially equivalent given the prevailing interest rates of the time.

Petitioners do not dispute that use of the 10% factor achieved actuarial equivalence. (R.51: Deposition of Craig Arnold, p.49; District Court, 7/13/89 bench opinion, Appendix A to the Petition, pages 51 and 52). Rather, Petitioners claim that use of a 10% discount rate for lump sum payment of SERO supplemental monthly benefits

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[14] That Respondent adhered to the Plan re: the application of discount factors is also demonstrated by the fact that it used a 6% lump sum discount factor in providing regular accrued retirement benefits. This 6% factor was required by the Plan, as it was the rate "last adopted" in connection with the lump sum payment of regular accrued retirement benefits.

was unauthorized under the Plan. The **only** support for their allegation is their expert's (Mr. Arnold) unsubstantiated assertion that he could not "find" authority for use of the 10% discount factor. [R.51: Deposition of Craig Arnold, p.49 (reproduced above under "Statement of the Case")].

Petitioners' expert does not cite Plan provisions or omissions to support the conclusion that use of the 10% discount factor was unauthorized by or inconsistent with Plan provisions. He simply states that he was unable to "find" authority for use of the 10% discount factor. This unsupported assertion/speculation fails to create a genuine issue of material fact which might preclude summary judgment. *See Merit Motors, Inc. v Chrysler Corp.*, 569 F.2d 666, 673 (D.C. Cir. 1977); *Jones v National Distillers & Chemical Corp.*, 484 F. Supp. 679 (S.D. N.Y. 1979).

When the record is objectively evaluated, the inevitable conclusion is that the District Court and Court of Appeals ruled appropriately. Use of the 10% discount factor achieves actuarial equivalence (as required by the Plan), and the terms of the Plan authorized the action taken by Respondent. All Petitioners provide is mere speculation unsupported by any fact. Further review by this Court is simply not required.

C. The Petition Should Be Denied Because Petitioners Were Not Injured Or Prejudiced By The Alleged Violation Of ERISA Reporting Requirements, And Respondent Made Full Disclosure Of All Required Information

Petitioners cite various ERISA reporting and disclosure requirements, and make unsupported assertions

that Respondent violated some or all of the cited provisions.[15] The only allegation of failure to comply with ERISA requirements which has any possible validity pertains to Respondent's failure to file with the Department of Labor ("DOL") a summary of the Plan modification concerning the SERO, as allegedly required by 29 U.S.C § 1022(a)(2).[16] As the District Court and Court of Appeals held, this claim is not actionable for several reasons.

First, Petitioners were apprised of all pertinent and required information. The Congressional purpose in enacting ERISA disclosure provisions is to insure that "the individual participant knows exactly where he stands with respect to the plan. . . . " *Firestone Tire & Rubber Company v Bruch*, 489 U.S. 101, 118, 109 S. Ct. 948, 103 L.Ed.2d 80 (1989). Accordingly, if a plan participant receives the information which ERISA requires, the employer's failure to comply with ERISA reporting requirements is not actionable. *Kammenstein v Jordan*

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[15] This Section addresses arguments made in pages 41 through 50 of the Petition.

[16] Respondent **admits** that it did not file a summary of material modification concerning the SERO with the DOL. This was due to the fact that Mr. Schrock did not believe that a filing was necessary because he did not consider the SERO a "material modification" under 29 U.S.C. § 1022. Respondent **does not admit** that this failure to file constitutes an ERISA violation. The question of whether ERISA was violated was never addressed by the District Court or the Court of Appeals, nor did it have to be. Respondent's position, adopted by these courts, was (and is) that even if this nonfiling constitutes an ERISA violation, it does not provide Petitioners with a cause of action.

Marsh Co., 623 F. Supp. 1109, 1112 (D. Mass. 1985); *Rubin v Decision Concepts, Inc.*, 566 F. Supp. 1057, 1058-1059 (S.D. N.Y. 1983).

Although Respondent did not file a summary of the Plan modification with the DOL, it informed Petitioners and other eligible employees of exactly where they stood with respect to the Plan and the SERO. In this regard, Respondent directs this Court's attention to the recitation in the "Statement of the Case" of all the information made available to Petitioners and all other employees. In short, as testified to by Mr. Schrock, the information that would have been filed with the DOL was contained in the SERO announcements sent to Respondent's employees. (R.105: Renewed Motion Reply Brief, Exhibit 1, 11/16/89 Affidavit of Frederick Schrock, ¶10).

Given the information disseminated to employees and other opportunities for group and individual counseling, the purpose behind ERISA reporting/disclosure requirements was realized. Petitioners have yet to identify any material information that they did not receive from Respondent that they would have received had a DOL filing been made. In addition, Petitioners have failed to provide any evidence to support their claim that Respondent provided inaccurate information concerning the SERO. Accordingly, Petitioners have no actionable claim.

A second reason why this claim lacks merit is that Petitioners have not established that they were injured or prejudiced by the nonfiling. To sustain a cause of action for a violation of ERISA's reporting or disclosure requirements, prejudice or injury must be demonstrated. Failure

to establish injury or prejudice means that no genuine issue of material fact exists, and the employer is entitled to judgment as a matter of law. *Kammenstein*, 623 F. Supp. at 1112; *Risch v Waukesha Title Company Inc.*, 588 F. Supp. 69, 72 (E.D. Wis. 1984), *aff'd*, 776 F.2d 1049 (7th Cir. 1985).

In the instant case, Petitioners have been unable to demonstrate that they were prejudiced or injured by Respondent's nonfiling. Petitioners make vague allegations that they would have acted differently had they known more about the SERO, but they never specify what additional information Respondent was obligated to provide that was not received by Petitioners.[17] Moreover, there is no evidence in the record to support any of Petitioners' assertions.[18] As before, Petitioners rely merely on after-the-fact speculation, nothing more.

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[17] Petitioners complain that they "could have" been informed that they would have been entitled to greater retirement benefits had they continued working. This protest is illusory, as common sense dictates that any employee would increase his/her retirement benefits by continuing employment. Moreover, the only request for additional information made by any Petitioner was appropriately responded to by Mr. Schrock. (R.51: Deposition of Craig Arnold, p.85; R.53: Deposition of Richard Richardson, p.71).

[18] Petitioners cite pages 36 and 37 of Petitioner Richardson's deposition transcript to support the argument that they would not have accepted the SERO had they been fully informed. However, this testimony merely recounts Petitioner Richardson's meeting with Robert Janks, an executive of Respondent, and a discussion about future positions for Petitioner Richardson. No mention was made of the SERO. This testimony does not even begin to support the proposition that

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Petitioners are unable to produce any evidence to support their allegations that they were inadequately or erroneously informed about the SERO, that had a DOL filing been made they would have obtained material information they did not already have, or that they were prejudiced by Respondent's nonfiling. Petitioners acted with full knowledge, accepted the SERO and received handsome lump sum retirement benefits. Under these circumstances, the Petition should be denied.

D. The Petition Should Be Denied Because Petitioners' Appeal From The Dismissal Of Their Pendent State Law Claims Is Not Timely

Petitioners ask this Court to review the Court of Appeals' affirmance of the District Court's dismissal of their pendent state law claims. The Court of Appeals' Judgment (Appendix A to the Petition, pages 11-31) was entered March 28, 1989.[19] Petitioners failed to file a Petition for Writ of Certiorari within ninety (90) days of this Judgment as required by 28 U.S.C. § 2101(c) and Rule 13.1 of the Rules of the Supreme Court of the United States.

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Petitioner Richardson would not have retired had he been provided additional information, that he did not receive information he requested, or that he was mislead with respect to the SERO.

[19] While this Judgment remanded Petitioners' ERISA claims to the District Court, it affirmed the dismissal of pendent state law claims. As of March 28, 1989 (the date of this Judgment), these state claims would not be heard in federal court absent reversal by this Court. Consequently, Petitioners should have sought this Court's review in 1989.

Now, after more than two years have passed since this ninety (90) day period expired, Petitioners have finally filed a Cert Petition. Petitioners' effort is too late – as to this question the Petition is jurisdictionally deficient and must be denied.

In addition, this question is moot. The pendent state law claims at issue continued to be litigated in the Michigan state courts (specifically, the Wayne County Circuit Court). Respondent has learned that these claims were settled, and the underlying action dismissed.

CONCLUSION

The questions presented in the Petition involve alleged questions of fact, and all of the questions presented were fully considered and correctly decided by the District Court and the Court of Appeals. As a result, these questions are simply not of the caliber justifying United States Supreme Court review. Accordingly, for the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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